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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

ROBERT L. JOSEPH and RACHELLE JOSEPH,

Petitioner,

v.

SALT LAKE CITY, a municipal corporation; DEE DEE CORRADINI; JERRY MENDEZ; STEVE BARTLETT,

Respondents.

On Petition For Writ Of Certiorari
To The Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

First Issue: Anderson v. Liberty Lobby, 477 U.S. at 247-48 (1986) made clear that summary judgment may be defeated where there is a "*genuine* issue of *material fact*." (emphasis in original). In this matter, both the court of appeals and the district court ignored this standard as to applies to the Josephs. When Mr. Joseph presented evidence that perjury (App. 50) had been committed in the former municipal tribunal proceedings appealed (see Supreme Court docket nos. 02-1211 and 02-1781) in order to unduly affirm adverse employment decisions against Joseph in those hearings the courts ignored the claims. Those hearings were held pursuant to state law for civil service employees. Instead of allowing Joseph's claims to proceed to trial in federal court, the lower courts both held that Joseph's § 1983 and RICO claims (both federal questions) were barred by the doctrines of res judicata and collateral estoppel referring to the former state process.

Second Issue: Arbaugh v. Y & H Corp., _ U.S. _, 126 S. Ct. 1235 (2006) made clear that elements of a cause of action are not jurisdictional questions. In this matter, Mr. Joseph claimed his due process rights under the Fifth and Fourteenth Amendments were violated by the manner in which the former civil services proceedings were conducted, including adverse rulings obtained from perjury and spoliation of evidence. In both § 1983 and RICO claims, predicate acts are a requirement, including conduct "under color of state law." The lower courts' rulings that Joseph's § 1983 and RICO claims were barred by either collateral estoppel or res judicata is fundamentally flawed

because the violations of Joseph's rights in the civil service proceedings is an essential element.

Third Issue: Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. at 251 (1944) made clear "fraud" committed in an "attempt to subvert the administration of justice" was a basis to set aside or vacate prior judgments. In this matter, despite the obvious act of fraud upon the former Civil Service Commission (App. 50) (Supreme Court docket nos.02-1211 and 02-1781) by the Salt Lake City Defendants here, the lower courts dismissed Mr. Joseph's § 1983 and RICO claims on the doctrines of collateral estoppel or res judicata citing Wilkes v. Wyo. Dep't of Employment Div. Of Labor Standards, 314 F.3d at 504 (10th Cir. 2002).

Fourth Issue: Congress enacted RICO with the intent to provide private citizens the right to prosecute their own civil actions against corrupt enterprises in 18 U.S.C. § 1962. Despite establishing predicate offenses did occur, including "perjury," "obstruction of justice," and "spoliation of evidence" (see App. 50) neither of the lower courts allowed Mr. Joseph to proceed with his RICO claims against the Defendants. Instead, the district court dismissed Joseph's causes of action but informed the parties that one of Joseph's witnesses could proceed with a cause of action of her own. (See App. 30, n. 5).

Fifth Issue: The standard of proof before the Salt Lake City Civil Service Commission is analogous to the Social Security Administration determined by this Court in Richardson v. Perales, 402 U.S. at 401 (1971). Both the Civil Service and SSA have a "substantial evidence" standard. If substantial evidence is presented the adverse action decided by Mr. Joseph's employer, the Chief of

Police is upheld. Through perjury, the adverse actions against Joseph were upheld and his appeals did not avail relief. (See Supreme Court docket no. 02-1211 and 02-1781). The standard of proof in Joseph's § 1983 and RICO actions are different (whether preponderance or clear and convincing depends of the issues). Despite this Court's decision concerning the preclusion of the application of res judicata and collateral estoppel when the burdens of proof are different as stated in Dowling v. United States, 493 U.S. 342 (1990), both lower courts found summary judgment against Joseph was proper under those theories.

Sixth Issue: While Mr. Joseph was being subject to a wrongful criminal investigations, (App. 50), Mrs. Joseph who arrived at the scene was detained for 4 ½ hours without justification. By police order, she was not free to leave. Despite the fact that the Fourth Amendment is clearly established law protecting all "persons" from unreasonable searches and seizures, the Tenth Circuit pared an exception applicable to alleged "witnesses" purporting that it was not clearly established law at the time of Mrs. Joseph's witness seizure. The Tenth Circuit's exception was created in Walker v. City of Orem, 451 F.3d 1139 (10th Cir. 2006). Based upon Walker, qualified immunity was granted to Salt Lake City Defendants responsible for seizing her. It was improper and an abuse of discretion for the Tenth Circuit to start making exceptions to the term "persons" provided in the Fourth Amendment as intended for centuries now.

Seventh Issue: In circumstances where qualified immunity is afforded, an aggrieved plaintiff should be entitled to her attorney's fees regardless, pursuant to 42 U.S.C. § 1988, because that plaintiff was responsible for assisting the

public in clearly establishing the law for future occasions. This is an issue of first impression.

Eighth Issue: 42 U.S.C. § 1985(2) and § 1985(3) have distinctly different origins and case interpretations by this Court. This Court has previous held that only 1985(3) requires an intent of "racial or class-based invidious discrimination." However that added require specifically is rejected by this Court as to 1985(2) claims in Kush v. Rutledge, 460 U.S. 719 (1983). Contrary to Mr. Joseph's claims that the City Defendants committed perjury in the state proceedings, Joseph's 1985(2) claim was dismissed on the basis there was no "evidence of racial or other class-based invidious discriminatory animus." (App. 30).

Ninth Issue: Mr. Joseph filed a malicious prosecution claim under § 1983 concerning his wrongfully filed criminal charge. (App. 50). Both lower courts required different standards, and Petitioner's review of other jurisdictions make clear there is no federal standard for elements of a baseless prosecution claim under § 1983.

Tenth Issue: In the Tenth Circuit pursuant to Trainor v. Apollo Metal Specialties, Inc., 318 F.3d at 979 (10th Cir. 2003), a defendant moving for summary judgment has the burden of establishing beyond reasonable doubt that they were entitled to summary judgment. Despite the evidence before the lower courts, including grand jury findings that the City Defendants were guilty of "obstruction of justice, perjury, false and inconsistent material statements, the suborning of perjury, official misconduct and spoliation of evidence," (App. 50), both lower courts awarded summary judgment in the defendants' favor.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	8
CONCLUSION	19
APPENDICES	

TABLE OF CITED AUTHORITIES

Adamson v. Provo, 819 F. Supp. 934 (D. Utah 1993) 13-14

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)..... 8

Arbaugh v. Y & H Corp, ___ U.S. ___, 126 S. Ct. 1235 (2006)..... 11

Dowling v. United States, 493 U.S. 342, 110 S. Ct. 688, 107 L. Ed. 2d 708 (1990)..... 15

Hatton-Ward v. Salt Lake City Corp., 828 P.2d 1071 (Utah Ct. App. 1992)..... 7

Hazel-Altas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)..... 12

Joseph v. McCann, 147 P.3d 547 (Utah Ct. App. 2006)..... 8

Joseph v. Salt Lake City Civil Serv. Comm'n, 53 P.3d 11 (Utah Ct. App. 2002)..... 7, 9

Kush v. Rutledge, 460 U.S. 719, 103 S. Ct. 1483, 75 L. Ed. 2d 413 (1983)..... 17

Monell v. Department of Social Servs. of New York, 436 U.S. 658, 695, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)..... 14

Monroe v. P[illegible], 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 492 (1961)..... 13

Richardson v. Perales, 402 U.S. 389, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)..... 14-15

Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976 (10th Cir. 2003)..... 18

Walker v. United States, 744 F.2d 67 (10th Cir. 1984)..... 15

Wilkes v. Wyo. Dep't of Employment Div. Of Labor Standards, 314 F.3d at 504 (10th Cir. 2002)..... 12

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

Robert and Rachelle Joseph ("Mr. Joseph" and Mrs. Joseph," respectively) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case, after the Tenth Circuit refused to reverse judgment of the United States District Court of the Central District of Utah granted summary judgment contrary to the case law issued by this Court.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit affirming summary judgment issued on December 15, 2006 and that court's denial of a petition for rehearing en banc was issued on February 2, 2007. They are contained in the Appendix at App. 1-22 and App. 23, respectively. The Orders of the district court is Appendix at App. 24-36 as to Salt Lake County Defendant Bartlett, and App. 37-49 as to Salt Lake City Defendants, Salt Lake City, Dee Dee Corradini, and Jerry Mendez.

STATEMENT OF JURISDICTION

The final decision of the United States Court of Appeals for the Tenth Circuit denying both Mr. and Mrs. Joseph's Petitions for Rehearing En Banc was entered on February 2, 2007. (App. 23). The jurisdiction of this Court to review this matter is invoked under 28 U.S.C. § 1254(1). This petition is due on or before May 3, 2007 and is therefore timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provisions are involved in this case:

I. The Due Process clause of the Fifth Amendment, which provides, inter alia:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. The Due Process clause of the Fourteenth Amendment, which provides, in Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

> enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. The Search and Seizure clause of the Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searches, and the persons or thing to be seized.

IV. The Acts of Congress, the Civil Rights Act of 1871 and the Ku Klux Klan Act, concerning 42 U.S.C. §§ 1983, 1985 and 1988.

STATEMENT OF THE CASE

Joseph began his employment with Salt Lake City as a police officer in 1997. Late in the evening of March 26, 1999, Mr. Joseph, who was then a Salt Lake City police officer, met his wife, Rachelle, at a park to give her a house key because she had been inadvertently locked out of their home. While they were conversing, a car passed them at excessive speed. Mr. Joseph left the park and pursued the car. When Mr. Joseph caught the speeding motorist an

altercation ensued in that the motorist opened the door and put the car in reverse motion, thereby scooping him onto the car. From on top of the car and while falling from the vehicle Mr. Joseph fired his weapon at the suspect eleven times before the motorist sped away with injuries. (App. 2-3, 56-57).

Rachelle Joseph happened upon the scene as she was driving home, before any other officers arrived but after the motorist had driven away. Mr. Joseph told her he had been involved in a shooting and asked her to leave. She obliged, but had not gone far when she saw emergency vehicles with lights on driving in her husband's direction. Fearing for his safety, Mrs. Joseph returned to the scene and approached Officer Poulsen at the scene perimeter, told him who she was, and asked to see her husband. Officer Poulsen let Mrs. Joseph, who was upset and crying, into his car so he could take her to the scene to talk to Mr. Joseph. Subsequent events at the shooting scene led her to file a claim under 42 U.S.C. § 1983 for alleged violations of her Fourth Amendment rights. The details are provided below. (App. 3).

Due to a rash of police involved shootings leading up to Joseph's own shooting incident, Salt Lake City's Mayor in 1999, Dee Dee Corradini informed Police officials to make an example of the next officer. She wanted to prevent future shootings from occurring because Salt Lake City does have a "Gestapo police force." This conversation was witnessed by one of Mr. Joseph's witnesses, who signed an affidavit, Trace Taylor. These allegations were never denied by the mayor or opposed. (App. 53).

Because of Corradini's instructions, both the Salt Lake City Police Department's Jerry Mendez and the Salt Lake County's investigator Steve Bartlett investigated Mr. Joseph's role in the shooting. Bartlett and Mendez withheld

from screening prosecutors the forensic evidence that showed that Mr. Joseph was in peril of his life or threatened with serious bodily injury. Instead, Mendez testified that Joseph was shooting from a standing position at the fleeing driver. (see App. 53, 59-60). Mr. Joseph was eventually indicted for second-degree aggravated assault. For the same testimony before the Salt Lake City Civil Service Commission, Mr. Joseph suffered adverse employment action. (App. 59-60, also see Supreme Court docket no. 02-1211 and 02-1781).

Before trial, however, the D.A.'s prosecutor Ernie Jones agreed to dismiss the charge once he became apprised of the true nature of Joseph's shooting–that Joseph was actually justified in his use of force.[1] Even though Mr. Joseph never stood trial for the shooting, he was terminated from the police force.[2] He appealed his termination to the Salt Lake City Civil Service Commission, but was accused of not participating in discovery and so the Civil Service Commission summarily affirmed Joseph's discharge. (App. 3).

It important to note here that the only remedy forfeited by the summary dismissal was the right to reinstatement. Utah law, section 10-3-1012, was interpreted by the Utah Court of Appeals has conveying the

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1 Being "justified" in his use of force has originals from the common law that a gailor in the defense of his life and in the effort to prevent the escape of a felony may use deadly force without blame. "Justified" is distinguishable from "excused" where some culpability exists due to mistake or misadventure.

2 See Supreme Court dockets no. 02-1211 and 02-1781.

municipality limited authority and the only remedy available to an employee before the civil service is reinstatement. Any other remedy including money damages have to be pursued elsewhere. See Hatton-Ward v. Salt Lake City Corp., 828 P.2d 1071 (Utah Ct. App. 1992).

Nonetheless, as stated in Petitions 02-1211 and 02-1781, Mr. Joseph lost his employment and none of the appellate courts, including this Court, overturned the decision. Mr. Joseph appealed the Commission's decision to the Utah court of Appeals, claiming that he had been denied the due process right to challenge his termination, but the present allegations of fraud were unknown to him at the time. The Utah Court of Appeals upheld the Commission's decision, specifically rejection Mr. Joseph's due process argument.[3] Joseph v. Salt Lake City Civil Serv. Comm'n, 53 P.3d 11, 16 (Utah Ct. App. 2002). The Utah Court of Appeals' judgment became final after both the Utah Supreme Court, Joseph v. Salt Lake City Civil Serv. Comm'n, 63 P.3d 104 (Utah 2002), and this Court, Joseph v. Salt Lake City Civil Serv. Comm'n, 540 U.S. 821 (2003), denied certiorari. (See docket nos. 02-1211 and 02-1781). (See also App. 4).

Mr. Joseph then pursued his §1983 and RICO case in the district court, which had been filed since April 19, 2000, eight days after the April 11, 2000 civil service hearing. (App. 59-60). The district court dismissed all claims against Mr. Yocom and Salt Lake County, and this Court affirmed. Joseph, 53 F. App'x at 4. Because of the advantages that decision provided Mr. Joseph under the doctrine of law of

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3 That Utah Court of Appeals decision and Joseph's previous appeal was made without the benefit of the disclosed crimes and City plans. (See App. 30, 53-60).

the cause, Mr. Joseph amended his complaint to allege malicious prosecution claims against Mr. Shepherd and Mr. Bartlett in their individual capacities. He also alleged that Salt Lake City deprived him due process during the Civil Service Commission hearings in the manner it was prosecuted – (1) that evidence was withheld from Joseph; (2) perjury had been committed; and (3) the prosecuting attorney acted as both prosecutor and legal advisor for the commissioners. The combinations of these acts led to a violation of state law, 10-3-1012, which mandates a full and fair hearing. (App. 4).

The United States District Court then dismissed the matter asserting inter alia grounds for dismissal, collateral estoppel and qualified immunity. (App. 21).

Concerning the Salt Lake City Defendants, case number 05-4181 is the Josephs' appeal of the district court's grant of summary judgment in favor of Salt Lake City and Officer Mendez on the Josephs' due process and Fourth Amendment claims. Also, Mr. Joseph alleges the Salt Lake City Defendants had unfairly stigmatized him through the bogus manner in which he was terminated. The evidence shows that the report alleging that Joseph was unfit for duties as a police officer (the subject of Supreme Court docket no. 02-1781) was fraudulently prepared by Dr. David McCann at the City's request. Dr. McCann actually had committed malpractice concerning his preparation of the report as determined by Utah's Division of Occupation and Professional Licensing, after Joseph complained against him. (See App. 61-62) (findings by DOPL was meritorious), but see Joseph v. McCann, 147 P.3d 547 (Utah Ct. App. 2006).

Unfortunately for the Josephs, despite a meritorious finding by DOPL, the Utah Courts determined that McCann was immune from liability claiming he owed no duty to

Joseph. Instead, the Court found that the duty was owed to Salt Lake City despite McCann callling Joseph his "patient." (App. 61-62) (stating McCann breached the applicable standard of care for a physician).

Dr. McCann misled Joseph into believing he was his "patient" and even called him "patient" in McCann's contract. Despite those logical implications, the Utah Court of Appeals ruled there was no duty owed to Joseph and concluded that McCann referring to Joseph as his "patient" was simply an "improper label." *Id.* at 550. Such a conclusion is contrary to well-settled law of contracts – that a contract is construed against the one who prepares it.

Except through this Court, it would appear that other plain, speedy remedy exists.

REASON FOR GRANTING THE PETITION

Certiorari Should Be Granted In This Case Because The Tenth Circuit Has Flagrantly Disregarded Clearly Established Law from this Court and No Other Plain, Speedy Remedy Exists in the Utah State Courts.

A. Summary Judgment Standards Were Followed, It Is Clear That A Genuine Issue Of Material Fact Existed Between These Parties Concerning Whether the City and County Defendants Deliberately Violated The Josephs' Civil Rights.

Before this Court is the question whether the Tenth Circuit properly looked at the matter of Josephs' summary judgment claims. In part, at issue here is Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) which this Court made clear that summary judgment is defeated where there is a "*genuine* issue of *material fact.*" (emphasis in original). Anderson was known by both courts, but not followed. (See App. 26). In this matter, both the court of appeals and the district court ignored this standard regarding summary judgment.

When Mr. Joseph presented evidence of perjury, obstruction of justice, and spoliation of evidence in order to oppose the collateral estoppel and res judicata defenses, the courts apparently ignored the evidence. The evidence of fraud supported the Josephs § 1983 and RICO claims, and the Courts should have allowed them to defeat summary judgment. (App. 10, 29, 50, 53-55, 56-58, 59-60, 61-62).

The Tenth Circuit merely referred to the claims of Joseph as an alleged "unconstitutional cabal." (App. 2). And despite a fourteen volume record on appeal, all placed under seal of the court, the court only dedicated one paragraph to address the subject. (App. 10, 21). The Tenth Circuit claimed, "The problem with this claim, however, its that the Utah Court of Appeals has already held 'that the Commission did not violate Joseph's due process right to a post-deprivation hearing.' *Joseph v. Salt Lake City Civil Serv. Comm'n*, 53 P.3d at 16." However, the issue before the United States District Court was not whether the Commission denied him due process. Because of the fraud committed by the City witnesses and the manner it was prosecuted, Joseph's claim before the United States District Court was that the city (not the commission) deprived him of a fair hearing.

In the United States District Court, Joseph opposed summary judgment by demonstrating that the evidence showed that the testimony of City's investigator Jerry

Mendez was contrary to the truth which was known by Mendez as the chief investigator of Joseph's shooting. The record showed that Mendez testified that witnesses had observed Joseph shooting from a standing position at the vehicle while it was allegedly fleeing. (App. 59-60). However, the facts revealed from actual witness testimony discovered during the United States District Court proceeding, witnesses indicated differently. Darin Bell, for instance, testified that Joseph was obviously injured after being "dragged" by the vehicle. (App. 56-57). He say Joseph getting up and no shots were being fired while he did so. The shooting sounds heard by him occurred before observing Joseph getting up, when he heard the car screeching. Similar to fraud on the court, Mendez's testimony was fraud on the Salt Lake City Civil Service Commission, which is only a municipal tribunal – it was not a court of law. (see Supreme Court docket nos. 02-1211 and 02-1781, Salt Lake City responses).

The fraud was committed motivated by Mayor Corradini's instructions to make an example of the next officer involved in a shooting. (App. 53-54). Salt Lake City's police shootings took place just prior to the commencement of the Olympics. Mendez's fraud on the civil service commission resulted in adverse employment decisions against Joseph being upheld. Those municipal proceedings were conducted pursuant to state law for civil service employees, in Utah Code Ann. § 10-3-1012 (1953, as amended).

The lower courts were wrong in their decisions and this Court should correct the injustice. Instead of allowing Joseph's claims to proceed to trial in federal court pursuant to federal law because Joseph raised genuine constitutional claims under the Fourth, Fifth and Fourteenth Amended, the courts both held that Joseph's § 1983 and RICO claims

(both federal questions) were barred by the doctrines of res judicata and collateral estoppel stemming from the former state process. The Congress never intended its acts, including civil rights and RICO claims to be easily disregarded by common law documents long superceded by the Congressional Acts specifically addressing the issues.

B. In Reality, Consistent with *Arbaugh*, the Prior Actions in the Civil Service Commission Were Predicate Acts Necessary to Raise Both RICO and § 1983 and § 1985(2) Causes of Action.

For this next question, Arbaugh v. Y & H Corp., _ U.S. __, 126 S. Ct. 1235 (2006) is advisory for this issue. Much needed, Arbaugh made clear that elements of a cause of action are not jurisdictional questions, a routine practice that had run away like a freight train. In this matter, Joseph claimed his due process rights under the Fifth and Fourteenth Amendments were violated by City Defendants the manner in which the former civil services proceedings were conducted, including the adverse rulings obtained because of perjury, spoliation of evidence, and obstruction of justice. In both § 1983 and RICO claims, these alleged acts serve as predicate acts are a requirement, including conduct "under color of state law" in order to file causes of action. The state law that the Salt Lake Defendants conducted themselves under was Utah Code Ann. § 10-3-1012 (1953, as amended). The civil service proceedings took place "under color of state law." An essential element of a state wrong, cannot serve against the complaining plaintiffs under collateral estoppel bar.

The lower courts' rulings here that Joseph's § 1983 and RICO claims were barred by either collateral estoppel or res judicata is fundamentally flawed because the

violations of Joseph's rights under the Constitution in the former civil service proceedings is an essential element needed to present his federal questions.

C. This Court Needs To Address the Conduct Alleged Here in the Same Context as It Did in *Hazel-Atlas*.

In Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. at 251 (1944) this Court vacated a patent fraudulent obtained. This Court made clear "fraud" committed in an "attempt to subvert the administration of justice" was a basis to set aside or vacate judgments. In this matter, despite the obvious act of a fraud (App. 50) upon the former Civil Service Commission (Supreme Court docket nos.02-1211 and 02-1781) by Jerry Mendez and known by other Salt Lake City Defendant's such as both Salt Lake City mayors, Dee Dee Corradini and Ross "Rocky" C. Anderson, (who represented Frank Hatton-Ward in the past and accused the City then of corruption), the lower courts dismissed Mr. Joseph's § 1983 and RICO claims on the doctrines of collateral estoppel or res judicata pursuant to Wilkes v. Wyo. Dep't of Employment Div. Of Labor Standards, 314 F.3d at 504 (10th Cir. 2002), refusing to address the merits of Joseph's claims. Fraud should always defeat collateral estoppel, otherwise mischief is invited to subvert the administration of justice in other cases.

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D. The Common Law Doctrines of Collateral Estoppel and Res Judicata Have Been Overridden In Situations Such As the Present Case Because of Specific Enactments of Congress.

In this matter, the lower courts barred Mr. Joseph from addressing his Civil Rights and RICO claims believing he was barred by res judicata or collateral estoppel, doctrines recognized at common law. Congress enacted RICO with the intent to provide private citizens the right to prosecute their own civil actions against corrupt enterprises in 18 U.S.C. § 1962. Despite establishing predicate offenses occurred, including "perjury," "obstruction of justice," and "spoliation of evidence" (see App. 50) neither of the lower courts allowed Mr. Joseph to proceed with his RICO claims against the Defendants. Instead, the district court dismissed Joseph's causes of action while reserving that right to one of Joseph's witnesses, Trace Taylor, who the court indicated that she could sue the City for retaliation or witness tampering. (See App. 30, n. 5).

The Civil Rights Acts are also acts of Congress indicating its intent to supercede the common law doctrines used against Joseph.

> The Reconstruction Civil Rights Acts provide private individuals with a civil cause of action for deprivation of rights secured by the United States Constitution. Within that Act, section 1983 affords an individual a civil claim against any "person" who deprives the litigant of any constitutionally guaranteed right under color of state law. 42 U.S.C. 1983. Originally enacted as the Civil Rights Act of 1871 (Ku Klux Klan Act), ch. 22, 17 Stat. 13 (1871) (codified as amended in 42 U.S.C. (1988)).

Adamson v. Provo, 819 F. Supp. 934 (D. Utah 1993) (footnotes omitted). For most of its history, the Act had very little effect. The legal community did not think the statute served as a check on state officials, and did not often litigate under the statute. However, this changed in 1961 when this Court decided Monroe v. Pape, 365 U.S. 167. In that case, the Court articulated three purposes that underlay the statute: "1) 'to override certain kinds of state laws'; 2) to provide 'a remedy where state law was inadequate'; and 3) to provide 'a federal remedy where the state remedy, though adequate in theory, was not available in practice.'" Blum & Urbonya, Section 1983 Litigation, p. 2 (Federal Judicial Center, 1998) (quoting Monroe v. Pape). Pape opened the door for renewed interest in Section 1983.

Here, according to this Court, even the City is considered a "person" as recognized in Monell v. Department of Social Servs. of New York, 436 U.S. 658, 695, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), because the alleged bad acts directed against Joseph was an official sanction from the Mayor or police administrators believing they were following the Mayor's instructions. In other words, the directive was accepted as a one-time "policy."

E. Because the Standards of Proof Were Different Between the Civil Service and the Subsequent § 1983 and RICO Claims, Collateral Estoppel and Res Judicata Claims Are Inapplicable.

Because the Civil Service Commission, the standard of proof there is analogous to the Social Security Administration determined by this Court in Richardson v. Perales, 402 U.S. at 401 (1971). Both the Civil Service and SSA have a "substantial evidence" standard. If substantial evidence is presented the adverse action decided by Mr.

Joseph's employer, the Chief of Police is automatically upheld. Here though, through perjury and concealment of evidence such as the state crime lab forensic results, the adverse actions against Joseph were wrongfully upheld and his following appeals did not avail him relief. (See Supreme Court docket no. 02-1211 and 02-1781).

The standard of proof in Joseph's § 1983 and RICO actions are very different (whether preponderance or clear and convincing depends of the issues).[4] Despite this Court's decision concerning preclusion of res judicata and collateral estoppel defenses when the burdens of proof are different as stated in Dowling v. United States, 493 U.S. 342 (1990), both lower courts found summary judgment against Joseph was proper. Because Dowling has not been overturned and because it has been good case law for 17 years, both lower courts committed plain error. That error should be corrected here.

F. Mrs. Joseph Is A "Person" Within the Clearly Stated Meaning of the Fourth Amendment, No New Exception For Witnesses Should Have Been Created By the Lower Courts.

While Mr. Joseph was being wrongfully investigated by Mendez for criminal charges, (App. 50), Mrs. Joseph who arrived at the scene out of concern for her husband was detained for 4 ½ hours without justification. By police order, she was not free to leave. Mendez informed officers

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4 Generally, civil rights actions have a preponderance standard and as for RICO the burden of proof is clear and convincing. Also, where liberty interests such as stigmatization, the burden on the Defendant is or should be clear and convincing.

that she was not free to leave. Despite the fact that the Fourth Amendment is clearly established law protecting all "persons" from unreasonable searches and seizures, the Tenth Circuit pared an exception applicable to alleged "witnesses" purporting that it was not clearly established law at the time of Mrs. Joseph's seizure.

The Tenth Circuit's exception was created in Walker v. City of Orem, 451 F.3d 1139 (10th Cir. 2006). Based upon Walker, qualified immunity was granted to Salt Lake City Defendants responsible for seizing her. It was improper and an abuse of discretion for the Tenth Circuit to start making exceptions to the term "persons" provided in the Fourth Amendment. That door is now open for other exceptions until the term "person" only means suspects. That was never the intent of the framers of the Bill of Rights. All "persons" are free from unreasonable searches and seizures. Its only suspects who are subject to searches and seizures, that has always been reasonable.

G. Qualified Immunity Should Not Bar A Plaintiff from Recovering Attorney's Fees For Consideration In Clarifying the Law.

In circumstances where qualified immunity is afforded, an aggrieved plaintiff should be entitled to her attorney's fees pursuant to 42 U.S.C. § 1988 regardless. Because that plaintiff was responsible for assisting the public in clearly establishing the law for future occasions she is or should be entitled to attorneys fees as an equitable relief. Equitable relief is entitled under § 1988 and the Act was created to encourage attorneys to act on persons' behalf, even as here to render assistance in defining an otherwise unclear law. This is an issue of first impression.

H. The Lower Courts have Confused Requirements Between § 1985(2) and 1985(3).

42 U.S.C. § 1985(2) and § 1985(3) have distinctly different origins and case interpretations. This Court has previous held that only 1985(3) requires an intent of "racial or class-based invidious discrimination." However that added require specifically is rejected by this Court as to 1985(2) claims in Kush v. Rutledge, 460 U.S. 719 (1983). Contrary to Mr. Joseph's claims that the City Defendants committed perjury in the state proceedings, Joseph's 1985(2) claim was dismissed on the basis there was no "evidence of racial or other class-based invidious discriminatory animus." (App. 30). In Kush, this Court clarified that through subsequent act of Congress the provisions of § 1985(2) and 1985(3) were consolidated without any intent to modify the existing laws. The understanding in Kush has been lost in the Tenth Circuit, despite the fact that Kush has been in force for 24 years.

I. Malicious Prosecution Is a Genuine Claim Under the Fourth Amendment Because An Essential Element of a Prosecution is Probable Cause – A National Standard Should Be Established.

Mr. Joseph filed a malicious prosecution claim under § 1983 concerning his wrongful criminal charge. (App. 50). Both lower courts required different standards, and Petitioner's review of other jurisdictions make clear there is no federal standard for elements of a baseless prosecution claim under § 1983. In the Tenth Circuit, the court stated:

> Mr. Joseph alleges in his § 1983 malicious prosecution claim that Mr. Bartlett "conducted [a]

> deliberate investigation against him" by allegedly failing to "follow [] the protocol, . . . to implore [sic] his own judgment . . . , and deliberately whether knowingly or recklessly, withheld the State Crime Lab information from prosecutors at the time of screening."

(App. 7). The district court stated:

> Plaintiff has failed to provide any authority for the proposition that a plaintiff may prevail on a Section 1983 malicious prosecution claim absent incarceration or a trial. While the specific requirements of a Section 1983 malicious prosecution claim remain unclear, the court is unaware of any case in which a Section 1983 malicious prosecution claim succeeded when the facts did not involve incarceration or a trial of the defendant.

(App. 28). That fact is a baseless prosecution did occur because no probable cause did exist and can exist when a police is "justified in his use of force." This is not a novel notion. It has existed since the common law.

J. Certainly No Summary Judgment Should have Been Granted Because The Defendants Failed to Meet There Burden of Proof "Beyond a Reasonable Doubt" They Were Entitled to Summary Judgment in Light of Fraud and Claims of Crimes Committed.

In the Tenth Circuit pursuant to Trainor v. Apollo Metal Specialties, Inc., 318 F.3d at 979 (10th Cir. 2003), a defendant moving for summary judgment has the burden of establishing beyond reasonable doubt that they were entitled to summary judgment. Despite the evidence presented to the lower courts including grand jury findings that the City

Defendants were guilty of "obstruction of justice, perjury, false and inconsistent material statements, the suborning of perjury, official misconduct and spoliation of evidence" (App. 50) both lower courts precluded Joseph's federal claims because of alleged application of collateral estoppel or res judicata. (App. 10, 36).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ADDENDUM

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROBERT JOSEPH,
Plaintiff-Appellant,

v.

RICHARD SHEPHERD and STEVE BARTLETT,
Defendants-Appellees.

ROBERT JOSEPH and RACHELLE JOSEPH,
Plaintiffs-Appellants,

v.

DEE CORRADINI; ROSS C. ANDERSON; RUBEN B. ORTEGA; JERRY MENDEZ; A.M. CONNOLE; also known as Mac Connole, in their individual capacities; SALT LAKE CITY, a municipal corporation; GUY YOSHIKAWA, an individual; ROY WASDEN, an individual; WILLIAM SHELTON, an individual SCOTT D. FOLSOM, an individual; JUDY DENCKER, an individual; MARK ZELIG, an individual; MARK SCHARMAN, an individual; MARK ASKERLUND, an individual; JASON SNOW, an individual; DAVID GREER, an individual ZANE SWIM, an individual;
Defendants-Appellees.

FILED
United States Court of Appeals
Tenth Circuit
December 15, 2006
Elisabeth A. Shumaker
Clerk of Court

No. 04-4212
(D.C. no. 2:00-cv-340 DAK)
(District of Utah)

No. 05-4181
(D.C. no. 2:00-cv-340 DAK)

ORDER AND JUDGMENT*

Before **BRISCOE, HOLLOWAY,** and **McCONNELL,** Circuit Judges.

This is the second time Plaintiff Robert L. Joseph has appeared before this Court to challenge district court rulings in favor of persons and entities he claims participated in an unconstitutional cabal to remove him from the Salt Lake City Police Department. In his first appeal, we affirmed the district court's grant of summary judgment to David Yocum, the Salt Lake County District Attorney, and Salt Lake County on Mr. Joseph's malicious prosecution claim. *Joseph v. Yocum*, 53 F. App'x 1, 4 (10th cir. 2002). This appeal comprises claims under 42 U.S.C. § 1983 against other employees of the Salt Lake County District Attorney's office, Salt Lake City, and officers of the Salt Lake City Police Department. We hold that the district court properly dismissed each defendant and therefore **AFFIRM** its judgments.

I. Facts

Late in the evening of March 26, 1999, Mr. Joseph, who was then a Salt Lake City police officer, met his wife, Rachelle, at a park to give her a house key because she had been inadvertently locked out of their home. While they were conversing, a car passed them at excessive speed. Mr. Joseph left the park and pursued the car. When Mr. Joseph caught the speeding motorist

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

an altercation ensued. Mr. Joseph claims that the motorist opened the door and put the car in motion, thereby scooping him onto the car. Mr. Joseph fired his weapon at the suspect eleven times before the motorist drove away.

Rachelle Joseph happened upon the scene as she was driving home, before any other officers arrived but after the motorist had driven away. Mr. Joseph told her he had been involved in a shooting and asked her to leave. She obliged, but had not gone far when she saw emergency vehicles with lights on driving in her husband's direction. Fearing for his safety, Mrs. Joseph approached Officer Poulsen at the scene perimeter, told him who she was, and asked to see her husband. Officer Poulsen let Mrs. Joseph, who was upset and crying, into his car so he could take her to the scene to talk to Mr. Joseph. Subsequent events at the shooting scene led her to file a claim under 42 U.S.C. § 1983 for alleged violations of her Fourth Amendment rights. We discuss those events in greater detail below, when reviewing the district court's dismissal of her claim.

Both the Salt Lake City Police Department and the Salt Lake County District Attorney's Office investigated Mr. Joseph's role in the shooting. The D.A.'s office assigned defendant Steve Bartlett to the case. As a result of the investigations by Mr. Bartlett and others, Mr. Joseph was eventually indicted for second-degree aggravated assault. Before trial, however, the D.A.'s office dropped the charges. On January 18, 2000, defendant Richard Shepherd wrote a letter to former Salt Lake City Police Chief Arthur Connole describing the decision of the D.A.'s office to file and subsequently drop charges against Mr. Joseph.

Even though Mr. Joseph never stood trial for the shooting, he was terminated from the police force. He appealed his termination to the Salt Lake City Civil Service Commission, but failed to participate in discovery. The City eventually filed a motion to dismiss Mr. Joseph's appeal as a sanction for his refusal to cooperate. Shortly before the Commission was scheduled to rule on that motion, Mr. Joseph, through counsel, agreed to provide all the materials the city had requested within fifteen days. Mr.

Joseph failed to live up to his end of the bargain, however, and the City again moved to dismiss. This time, the Commission granted its request. Mr. Joseph appealed the Commission's decision to the Utah court of Appeals, claiming that he had been denied the due process right to challenge his termination. The Utah Court of Appeals upheld the Commission's decision, specifically rejection Mr. Joseph's due process argument. *Joseph v. Salt Lake City Civil Serv. Comm'n,* 53 P.3d 11, 16 (Utah Ct. App. 2002). The Utah Court of Appeals' judgment became final after both the Utah Supreme Court, *Joseph v. Salt Lake City Civil Serv. Comm'n,* 63 P.3d 104 (Utah 2002), and the United States Supreme Court, *Joseph v. Salt Lake City Civil Serv. Comm'n,* 540 U.S. 821 (2003), denied certiorari.

Mr. Joseph then filed this § 1983 case in the district court. The district court dismissed all claims against Mr. Yocum and Salt Lake County, and this Court affirmed. *Joseph,* 53 F. App'x at 4. Mr. Joseph then amended his complaint to allege malicious prosecution claims against Mr. Shepherd and Mr. Bartlett. He also alleged that Salt Lake City denied him due process during the Civil Service Commission hearings.

II. Procedural History and Standard of Review

Case number 04-4212 is Mr. Joseph's appeal from the grant of a Rule 12(b)(6) motion to dismiss the malicious prosecution claims against Mr. Shepherd and Mr. Bartlett. We review *de novo* the district court's grant of a Rule 12(b)(6) motion to dismiss, "applying the same standards as the district court." *Moore v. Guthrie,* 438 F. 3d 1036, 1039 (10th Cir. 2006). We accept all well-pleaded factual allegations in the complaint as true and view them "in the light most favorable to the nonmoving party." *Id.* (Internal quotation marks omitted). But merely conclusory allegations in a complaint do not constitute well-pleaded factual allegations. *Tal v. Hogani,* 453 F. 3d 1244, 1261 (10th Cir. 2006).

Case number 05-4181 is the Josephs' appeal of the district court's grant of summary judgment in favor of Salt Lake City and Officers Mendez and Zelig on their due process and Fourth Amendment claims. "We review the grant of summary judgment

de novo and affirm only if the record, considered in the light most favorable to the [nonmoving party], establishes no genuine issue of material fact, and the defendant is entitled to a judgment as a matter of law." *Westland Holdings, Inc.* V. Lay, 462 F. 3d 1228, 1229 (10th Cir. 2006) (internal quotation marks and citations omitted).

III. The Malicious Prosecution Claims

A. Richard Shepherd

In January 2000, Richard Shepherd was the director of the Criminal Division in the Salt Lake county District Attorney's office. On January 18, 2000, he wrote a letter to then-Police Chief Arthur Connole describing his office's decision to file and then dismiss criminal charges against Mr. Joseph for Joseph's role in the March 26, 2999, shooting. The letter contained Mr. Shepherd's opinion of the legality of Mr. Joseph's conduct, concluding with this statement: "Unfortunately there are factual disputes that exist and there is no other forum available to resolve these issues. The only conclusion I can assert with some finality is that the decision was made not to proceed further with criminal prosecution." Appellees' Br., Ex. H, at 2. Mr. Joseph's claims against Mr. Shepherd relate solely to Shepherd's authorship of that letter. Appellant's Br. 8.

Since this letter followed the dismissal of criminal charges against Mr. Joseph, it cannot form the basis for a § 1983 malicious prosecution claim. *See Roska ex rel. Roska v. Peterson*, 328 F. 3d 1230, 1244 (10th Cir. 2003). The only possible due process claim it may raise is an infringement upon Mr. Joseph's "'liberty interest in [his] good name and reputation as it affects [his] property interest in continued employment.'" *Stidham v. Peace Officer Standards & Training*, 265 F. 3d 1144, 1153 (10th Cir. 2001) (quoting *Workman v. Jordan*, 32 F. 3d 475, 480 (10th Cir. 1994)). The district court held that Mr. Joseph failed to state a claim. We agree.

To establish this type of liberty deprivation, a plaintiff must

allege and prove each of these four elements: "'First, . . . the statements must impugn the good name, reputation, honor, or integrity of the employee. Second, the statements must be false. Third, the statements must occur in the course of terminating the employee or must foreclose other employment opportunities. And fourth, the statements must be published.'" *Id.* (quoting *Workman*, 32 F. #d at 481).

Mr. Joseph's brief does not cite to the paragraphs in his complaint that allege these four elements. The complaint is particularly deficient in two respects. First, although the complaint contains the conclusory allegation that the letter was "falsified," it does not identify any specific statements of purported facts that it alleges both to be false and to impugn his reputation. Mr. Shepherd's letter states that "[t]he only conclusion I can assert with some finality is that the decision was made not to proceed further with criminal prosecution." Appellees' Br., Ex. H, at 2. That statement– the only factual conclusion asserted with "some finality"– is undoubtedly true, and it does not impugn his reputation. Mr. Joseph does not contend otherwise. The letter also states that "[u]nfortunately there are factual disputes that exist," but again, Mr. Joseph does not contend this is false (indeed, his account of the events in question seems to corroborate rather than contradict the presence of factual disputes). Nor does this statement impugn Mr. Joseph's reputation. In his brief, Mr. Joseph seems to argue that the problem with the letter is that it insinuated the reason for dismissing the case was lack of, or uncertainty about, the evidence, rather than that Mr. Joseph was exonerated. But Mr. Joseph's obligation as a plaintiff is to identify a statement in the letter that is false and that impugns his good name. Failure to exonerate him is not the same as impugning his good name, reputation, honor, or integrity.

Second, the complaint contains no allegation that Mr. Shepherd "published" the letter. Internal communications, if not mad public, can have no effect on a n employee's good name or reputation, and there is no allegation in the complaint that the defendants made the letter public. *See Lancaster v. Indep. Sch. Dist. No.* 5, 149 F. 3d 1228, 1235 (10th Cir. 1998) ("Also fatal to

plaintiff's liberty interest claim is the fact that the defendants made no public statements disparaging [the plaintiff] or harming his standing or associations in the community. The Supreme Court has rejected the theory that the mere fact of dismissal, absent some publicizing of the reasons for the action, could amount to a stigma infringing ones liberty." (Internal quotation marks and emphasis omitted)); *Dickeson v. Quarberg*, 844 F. 2d 1435, 1440 (10th Cir. 1988) ("A liberty interest is not violated when one is discharged without public disclosure of the reasons for the discharge."). Accordingly, we affirm the district court's judgment dismissing this cause of action for failure to state a claim.

B. Steve Bartlett

Steve Bartlett was the district attorney's office investigator assigned to Mr. Joseph's shooting incident. Mr. Joseph alleges in his § 1983 malicious prosecution claim that Mr. Bartlett "conducted [a] deliberate investigation against him" by allegedly failing to "follow [] the protocol, . . . to implore [sic] his own judgment . . . , and deliberately whether knowingly or recklessly, withheld the State Crime Lab information from prosecutors at the time of screening." Appellant's Br. 6. The district court held that Mr. Bartlett was entitled to prosecutorial immunity and qualified immunity. It also held that Mr. Joseph's claims against Mr. Bartlett were barred by claim and issue preclusion.

We affirm the district court's judgment granting absolute immunity to Mr. Bartlett for his role "in presenting criminal charges to the D.A. by personally preparing an information against Officer Joseph [and by] obtain[ing] an arrest warrant." Appellant's App. 60. Though Mr. Bartlett is not the prosecutor, prosecutorial immunity extends to certain agents of the prosecutor when they are engaged in performing tasks that are inherently prosecutorial in nature. As we explained in *Perez v. Ellington*, 421 F. 3d 1128 (10th Cir. 2005), when determining whether a defendant is entitled to absolute immunity, we employ a functional approach that examines "' the nature of the function [the

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defendant] performed, not the ide of the actor who performed it.'" *Id.* At 1133 (quoting *Malik v rapahoe County Dep't of Soc. Servs.*, 191 F. 3d 1306, 1314 (10th Cir. 1999)). An investigator who prepares a criminal complaint and seeks an arrest warrant is therefore entitled to absolute immunity. *Roberts v. Kling*, 144 F. 3d 710, 711 (10th Cir. 1998). With regard to the district court's holding that Mr. Bartlett enjoys absolute prosecutorial immunity for his role in these two actions, this case is controlled by *Roberts*, and we affirm.

We also agree that qualified immunity shields Mr. Bartlett from liability with regard to the other allegations in Mr. Joseph's complaint. "In order to defeat a qualified immunity defense, 'a plaintiff must show that (1) the official violated a constitutional or statutory right; and (2) the constitutional or statutory right was clearly established when the alleged violation occurred.'" *Johnson ex rel. Estate of Cano v. Holmes*, 455 F. 3d 1133, 1142 (10th Cir. 2006) (quoting *Mimics, Inc. V. Village of Angel Fire*, 394 F. 3d 836, 841 (10th Cir. 2005)).

Mr. Joseph fails at step one. We recently reiterated that in constitutional tort cases, "the common law tort serves as an important guidepost for defining the constitutional cause of action," but "the ultimate question is always whether the plaintiff has alleged a constitutional violation." *Pierce v. Gilchrist*, 359 F. 3d 1279, 1289 (10th Cir. 2004) (citing *Taylor v. Meacham*, 82 F. 3d 1556, 1561 (10th Cir. 1996)). Most of Mr. Joseph's factual allegations simply do not state a Fourth Amendment violation. It is not unconstitutional for a district attorney's office employee to investigate a crime as his superiors direct, nor is it unconstitutional for an investigator to rely upon a fellow officer's investigation when determining whether probable cause for an arrest exists. *See United States v. Troutman*, 458 F. 2d 217, 220 (10th Cir. 1972). While withholding exculpatory evidence that would vitiate probable cause for an arrest can amount to a Fourth Amendment violation, *see Pierce*, 359 F. 3d at 1292, Mr. Joseph does not allege that this occurred here.

In *Grubbs v. Bailes*, 445 F. 3d 1275, 1278 (10th Cir. 2006), this Court said that "[t]he constitutional inquiry" for a claim such as

Mr. Joseph's "focuses on the materiality of the misconduct in relation to the determination of probable cause." *Id.* The Court continued:

> Where information has been omitted from an affidavit, we determine the existence of probable cause by examining the affidavit as if the omitted information had been included and inquiring if the affidavit would still have given rise to probable cause for the warrant.
>
> If hypothetically correcting the misrepresentation or omission would not alter the determination of probable cause, the misconduct was not of constitutional significance and is not actionable under § 1983; but if this hypothesizing would alter the probable-cause determination, the misconduct undermined Fourth Amendment guarantees and may support redress under § 1983.

Id. (Internal quotation marks and citations omitted).

Mr. Joseph's brief does not direct us to specific averments in his complaint that describe what facts Mr. Bartlett allegedly neglected to tell prosecutors. Out of an abundance of caution, we examined the complaint ourselves and reviewed such allegations. The seven or so we found do not on their face vitiate probable cause for Mr. Joseph's arrest, nor does he explain in his brief how they might do so. Accordingly, Mr. Joseph's allegations do not state a Fourth Amendment violation, and the district court properly held that Mr. Bartlett was entitled to qualified immunity.

IV. The Due Process and Fourth Amendment Claims

Case number 05-4181 involves appeals by Robert Joseph and his wife, Rachelle Joseph, from the district court's judgment in favor of Salt Lake City Corporation, Lieutenant Zelig, and Sergeant Mendez.. The Josephs' opening brief lists eight issues for appeal but contains argument sections corresponding only to

three of them.[1] We will address only those three issues they briefed, for "[o]n appeal, . . . parties must do more than offer vague and unexplained complaints of error. Perfunctory complaints that fail to frame and develop an issue are not sufficient to invoke appellate review." *Femedeer v. Haun*, 227 F. 3d 1244, 1255 (10th Cir. 2000) (internal quotation marks and brackets omitted).

A. Salt Lake City

First, Mr. Joseph argues that Salt Lake City "deprived Joseph a [sic] due process in the manner it had prosecuted [him] during the course of the Salt Lake City Civil Service Proceedings." Appellant's Br. 26-27. The problem with this claim, however, is that the Utah Court of Appeals has already held "that the Commission did not violate Joseph's due process right tot a post-deprivation hearing." *Joseph v. Salt Lake City Civil Serv. Comm'n*, 53 P. 3d at 16. The Utah Court of Appeals' holding stemmed from Joseph's multiple failures, though he was represented by counsel, to comply with the City's discovery requests. *See id.* At 14, 16. Because this claim already has been litigated to finality between these same parties, the doctrice of claim preclusion bars this cause of action. *Wilkes v. Wyo. Dep't of Employment Div. Of Labor Standards*, 314 F. 3d 501, 504 (10th Cir. 2002).

B. Rachelle Joseph

Rachelle Joseph sued Lieutenant Mark Zelig and Sergeant Jerry Mendez under § 1983 for allegedly violating her Fourth

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[1] In addition to the two issues discussed below, Mr. Joseph challenges the district court's dismissal of his complaint against Salt Lake City as a sanction for scandalous litigation practices. *See* Appellant's Br. 37-44. Because we affirm the dismissal on the merits, we need not address this alternative holding.

Amendment rights after she voluntarily returned to the shooting scene. She alleges that she was detained in a locked police car for several hours, even after she had given a statement to a police officer and had expressed a desire to go home. She contends that this encounter constituted a seizure for purposes of the Fourth Amendment and that the length of the detention – four hours – was unreasonable. Appellant's Br. 47. The district court granted summary judgment for the defendant officers, and we affirm.

1. Factual Background and District Court Ruling

It is undisputed that Mrs. Joseph and her minor son were the first people on the scene after the shooting. Her husband told her that he had just been involved in a shooting and asked her to leave. She left but soon saw emergency vehicles with lights on speeding towards her husband, so she voluntarily returned to the scene. Her purpose in returning was to make sure her husband was unharmed. Appellant's App. 886, 944, 951.

She arrived around 1:00 a.m. By that time, the police had set up a perimeter around the scene. She approached Officer Poulsen, who is not a defendant, and told him who she was and that she had been with her husband just prior to the shooting. She and her son got into his car so he could take them to the scene and facilitate a visit with Mr. Joseph. *Id.* At 945, 951. They sat with Officer Poulsen in his car for half an hour to forty-five minutes. *Id.* At 887, 945, 952. After sitting with Officer Poulsen for some amount of time, "somebody came in and told [Officer Poulsen] to take" Mrs. Joseph's statement, which he did. R. Joseph Dep., Appellee's Supp. App. 92. Mrs. Joseph does not "remember exactly" what she said to him. *Id.* At 93. At about this same time – about half an hour to forty-five minutes after she arrived at scene – Mrs. Joseph testified that Officer Poulsen told her that Officer Mendez had requested that she be taken to the police station for questioning. Appellant's App. 887, 946, 952. Mrs. Joseph never spoke directly with Officer Mendez; rather, she learned of Mendez's request from Officer Poulsen and Officer Zelig. *Id.* At 887, 953. Either as part of this conversation or somewhat later,

Mrs. Joseph spoke to her husband and learned for the first time that he was "okay." Supp. App. 100.[2]

According to her version of the events,[3] she remained in the police car until she was told, apparently by Detective Wooldridge, a non-defendant, that she could leave and that she would be interviewed later. App. 890. In her deposition, Mrs. Joseph estimated that she returned home between 3:00 a.m. and 4:30 a.m. Supp. App. 103. In her affidavit, she stated that she "got home around 5:30 a.m." App. 888. She estimated that her home was about a 25 minute drive from the scene of the shooting. Supp. App. 102. As is appropriate on a motion for summary judgment, the district court gave the plaintiff the benefit of the doubt, and assumed she was in the police car for a total of four hours.

During the period between her last contact with Officer Zelig and her departure for home, Mrs. Joseph remained in the locked police car. App. 888-89. An officer from either the Sandy or Salt Lake City Police Departments drove to Mrs. Joseph's home to check on her children. The officer observed the children and

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2Mrs. Joseph's deposition testimony differed from her affidavit with regard to the precise time of these events. In her deposition, she estimated that Officer Poulsen told her she had to go to the station between 30 and 45 minutes after her arrival, Supp. App. 97, and she talked with her husband more than an hour, and possibly more than two hours, after her arrival. *Id.* At 100. In her affidavit which was prepared subsequent to her deposition, Mrs. Joseph stated that the request that she be taken to the station for questioning and her conversation with her husband occurred at the same time, about half an hour after she arrived at the scene of the shooting. App. 887. Neither party treats these discrepancies as material.

3Officer Poulsen testified by affidavit that Mrs. Joseph left the scene "shortly after she spoke with her husband and determined he was okay," that he was never asked or ordered by any officer to detain her, and that she was not detained. Poulsen Aff. At 2, App. 858. For purposes of summary judgment, the district court properly credited Mrs. Joseph's version of the events.

informed Mrs. Joseph that they were sleeping and appeared all right. *Id.* at 889. During the night, several officers brought her and her son hot chocolate. One officer took her son to use a convenience store restroom, and Officer Poulsen later took her and her son to another nearby restroom. *ID.* At 889, 892. When Mrs. Joseph left the scene to go home, she thanked Officer Poulsen before she left, and hugged him. Poulsen Aff. at 3, App. 859.

The district court granted summary judgment in favor of the defendants, stating a number of alternative grounds:

> Although there is a dispute as to the length of time Mrs. Joseph was at the scene of the shooting, and the court is not permitted to make factual determinations in the context of a summary judgment motion, the court nonetheless agrees with the City Defendants that no reasonable jury could conclude that the police conduct in this case would have communicated to a reasonable person that she had been detained. Moreover, even if the undisputed facts supported the fact that Mrs. Joseph reasonably perceived under the circumstances. Mrs. Joseph had indicated that she was the first on the scene, and it was reasonable for the officers to seek to question her. They understandably had certain duties that they were required to attend to before they could assist Mrs. Joseph in talking with her husband. There is no indication that the detention was painful, degrading, or unduly prolonged. There is no evidence that the officers used or threatened to use any force or that they made threatening statements. There is no evidence that the officers unnecessarily detained her after they learned that she had not seen the actual incident.
>
> In addition, there is no clearly established law regarding the length of time an officer may request that a witness stay for questioning. Thus, even assuming that Mrs. Joseph was actually detained at the scene of the shooting for over four hours, against her will, the remaining defendants would have qualified immunity for their

actions. Accordingly, her claim for unlawful detention is dismissed.

App. 81-82. Mrs. Joseph now appeals from this order.

2. Standard of review

Because Officers Mendez and Zelig invoked the defense of qualified immunity, Mrs. Joseph must show that they violated her clearly established Fourth Amendment rights in order to hold them liable under § 1983 . *Johnson ex re. Estate of Cano*, 455 F. 3d at 1142. We review *de novo* a grant of summary judgment based on qualified immunity, "and affirm only if the record reveals no genuine issue of material fact." *Arredondo v. Locklear*, 462 F. 3d 1292, 1297 (10th Cir. 2006). To prove that there is a genuine issue as to a material fact– i.e., that summary judgment is improper and a trial is necessary– the non moving party must show that "the evidence, construed in the light most favorable to the non-moving party, is such that a reasonable jury could return a verdict for the non-moving party." *Bones v. Honeywell Int'l, Inc.*, 366 F. 3d 869, 875 (10th Cir. 2004) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986)). That obligation requires the nonmoving party to "'make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Hom v. Squire*, 81 F. 3d 969, 974 (10th Cir. 1996) (quoting *Celotex Corp. V. Catrett*, 477 U.S. 317, 322 (1986)). It is also well established that we "may affirm a grant of summary judgment on grounds other than those relied on by the district court when the record contains an adequate and independent basis for that result." *Bones*, 366 F. 3d at 875 (citing *Cone v. Longmont United Hosp. Ass'n*, 14 F. 3d 526, 528 (10th Cir. 1994)).

3. Mrs. Joseph's Brief

The Appellants' opening brief consists of slightly more than two pages of argument addressing Mrs. Joseph's detention. It contains precisely five record citations, four of which are citations

to the district court's order; the fifth refers to legal argument by the city attorney in district court. *See* Appellant's Br. 45-48. The brief cites one Tenth Circuit case discussing what qualifies as a seizure under the Fourth Amendment but does not otherwise develop the remaining framework that governs suits under § 1983 for Fourth Amendment violations. The Appellants' reply brief does not even mention Mrs. Joseph's claims.

This is barely sufficient to invoke appellate review. *See Femedeer*, 227 F. 3d at 1255. Mrs. Joseph does not identify the essential elements on which she would bear the burden of proof at trial, *Hom*, 81 F. 3d at 973-74, nor does she cite *one piece* of evidence that would allow a reasonable jury to find in her favor on those (unmentioned) elements. *See Bones*, 366 F. 3d at 875. Nor does she offer any reply to Appellees' alternative ground that the detention, if it was a detention, was reasonable. Appellees' Br. 44-48.

It is well established in this Circuit that it is not the Court's responsibility to "search the record in an effort to determine whether there exists dormant evidence which might require submission of the case to a jury." *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F. 2d 1022, 1025 (10th Cir. 1992); *see also United States v. Abdenbi*, 361 F.3d 1282, 1290 (10th Cir. 2004) ("this court should neither raise *sua sponte* an argument not advanced by a party either before the district court or on appeal, nor then advocate a particular position and resolve the appeal based on that advocacy.").

Notwithstanding the deficiencies in Appellants' brief, we will set forth our rationale for affirmance.

4. Analysis

Although the district court's grant of summary judgment was based on a number of alternative grounds, Appellants focus their argument on the proposition the "the [district] Court should have determined that Plaintiff was seized for purposes of the Fourth Amendment and that the four hour detention was unreasonable." Appellants' Br. 47.

To determine whether the conduct of Officers Zelig and Mendez constituted an investigative detention, we ask whether, "'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Michigan v. Chesternut,* 486 U.S. 567, 573 (1988) (quoting *United States v. Mendenhall,* 446 U.S. 544, 554 (1980)). In *United States v. Hill,* 199 F. 3d 1143 (10th Cir. 1999), we identified these factors as guiding our determination of whether a person was subject to this type of seizure:

> the threatening presence of several officers; the brandishing of a weapon by an officer; some physical touching by an officer; use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory; prolonged retention of a person's personal effects . . . ; a request to accompany the officer to the station; interaction in a nonpublic place or a small, enclosed place; and absence of other members of the public.

Id. At 1147-48. "None of these factors are dispositive, nor should they be treated as exclusive, and it may be that the strong presence of two or three factors demonstrates that a reasonable person would have believed that he was not free to terminate an encounter with government officials." *Fuerschbach v. Southwest Airlines Co.*, 439 F. 3d 1197, 1203 910th Cir. 2006) (internal quotation marks omitted).

When evaluating an investigative detention's reasonableness, we ask (1) was the detention "'justified at its inception,'" and (2) were the officer's actions "'reasonably related in scope to the circumstances which justified the interference in the first place'"? *United States v. Johnson,* 364 F. 3d 1185, 1189 (10th Cir. 2004) (quoting *Terry v. Ohio,* 392 U.S. 1, 20 (1968)). "At both stages, the reasonableness of the officer's suspicions is judged by an objective standard taking the totality of the circumstances and information available to the officers into account." *Id.* (Internal quotation marks omitted). In addition, the Supreme Court has

held that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop," *Florida v. Royer,* 460 U.S. 491, 500 (1983), and that police must "diligently pursue their investigation," *United States v. Place,* 462 U.S. 696, 709 (1983). In this connection, the Supreme Court has "impose[d] no rigid time limitation" on investigative detentions, preferring instead to let "common sense and ordinary human experience . . . govern over rigid criteria." *United States v. Sharpe,*470 U.S. 675, 685 (1985).

The most glaring deficiency in Mrs. Joseph's case is the absence of any evidence connecting the supposed constitutional violation to the defendants. As this Court recently explained:

> Section 1983 requires plaintiffs to show causation, imposing liability on a defendant who "subjects, or causes to be subjected, any citizen. . . to the deprivation of any rights . . . ." 42 U.S.C. § 1983. We have explained Section 1983's causation requirement: "[A] defendant may not be held liable under § 1983 unless he or she subjected a citizen to the deprivation, or caused a citizen to be subjected to the deprivation." *Tonkovich v. Kan. Bd. Of Regents,* 159 F. 3d 504, 518 (10th Cir. 1988). "A plaintiff must allege factual causation– i.e. 'but for' causation– in order to state a claim under § 1983." *Scott v. Hern,* 216 F. 3d 897, 911 (10th Cir. 2000).

Lippoldt v. Cole, – F. 3d – , 2006 W L 3200864, at *11 (10th Cir. Nov. 7, 2006). Because Mrs. Joseph intentionally omitted Officer Poulsen as a defendant and sued only Officers Mendez and Zelig, *see* Appellee's Supp. App. 113, it is important to identify exactly what role Mendez and Zelig played in the incident.

In her memorandum in opposition to the defendants' motion for summary judgment, Mrs. Joseph expressly admitted "that Mendez's involvement" with the incident "was limited to the following":

> a. Zelig said that Mendez wanted to have her taken to the

> police station to be interviewed. This occurred at approximately 1:30 or 1:45 a.m., one-half hour or forty-five minutes after Rachelle first entered Officer Poulsen's police car.
>
> b. Rachelle Joseph never personally spoke to Mendez.
>
> c. Rachelle Joseph has no other knowledge of Mendez's involvement with her alleged detention.

Appellant's App. 948, 958, citing R. Joseph Dep. At 39, 40, 46. Similarly, Appellant expressly admitted "that Zelig's involvement is limited to the following":

> a. Zelig told Officer Poulsen that Mendez wanted to have her taken to the police station to be interviewed. This occurred at approximately 1:30 or 1:45 a.m., one-half hour or forty-five minutes after Rachelle first entered Officer Poulsen's police car.
>
> b. Zelig asked or told Rachelle Joseph to wait for a homicide detective to talk to her about the events she observed or possibly told this to someone else and Rachelle Joseph overheard him. This is probably the same event described in (a) above.

Id. at 948-49, 959, citing r. Joseph Dep. at 39, 40, 87-89.

By Appellants' own admission, therefore, Officers Zelig and Mendez had no direct or indirect contact with Mrs. Joseph after 1:45 a.m. This was forty-five minutes after she voluntarily returned to the scene, no later than fifteen minutes after she gave her statement to Officer Poulsen, and about the same time she saw and spoke to her husband. Neither defendant had any further involvement in her alleged detention. Lieutenant Zelig's entire involvement was to convey Sergeant Mendez's desire that she be further questioned. There is no evidence that either defendant was aware that she remained in the police car as long as she did, knew

that she had requested to go home,[4] or was otherwise aware of the conditions or circumstances.

Based on this record, we conclude that the district court properly granted summary judgment for the defendants. It is undisputed that Mrs. Joseph was at the shooting scene voluntarily for between thirty and forty-five minutes, until she talked to her husband and learned he was not seriously injured. Because this portion of the encounter was consensual, it does not implicate the Fourth Amendment. *Lopez*, 443 F. 3d at 1283. At the very earliest, the incident escalated from a consensual encounter to an investigative detention after Mrs. Joseph learned that Officer Mendez wanted her to be interviewed. *See Shareef*, 100 F. 3d at 1500. Assuming without deciding that at this point the encounter became an investigative detention, Mrs. Joseph must also show that the detention was unreasonable, *Fuerschbach*, 439 F. 3d at 1202, by identifying evidence from which a reasonable jury could conclude that her detention was not justified at its inception and not reasonably related in scope to the circumstances justifying it, *Johnson*, 364 F. 3d at 1189.

As to the first step, the undisputed evidence shows that Officers Mendez and Zelig were justified in asking Mrs. Joseph to be interviewed. They knew that Mrs. Joseph was the first on the shooting scene and thus a possible crime witness. Mrs. Joseph does not argue that this judgment was unreasonable.

4In her deposition, Mrs. Joseph testified:

Q: Did you ever tell anybody, I've told you all I know. I want to go home?
A: Yes.
Q: Who did you tell that?
A: Poulsen

R. Joseph Dep., Supp. App. 99. In her affidavit, Mrs. Joseph stated that she told certain "officers" that she wanted to go home, mentioning only Cameron Platt by name. R. Joseph Aff. At 5, App. 888. This was after her last conversation with Officer Zelig.

Mrs. Joseph's apparent argument is that any further questioning was unnecessary because she had already told Officer Poulsen that she did not observe the shooting and did not know anything. We do not agree. There is no evidence that Officers Mendez or Zelig knew that Mrs. Joseph had given a statement to Officer Poulsen; indeed, there is no evidence that her statement to Poulsen preceded Mendez's decision to question her. Nor is there any evidence that they knew, at the time of that decision, what she said to Officer Poulsen. Moreover, when they asked Mrs. Joseph to be interviewed, Officers Mendez and Zelig knew that Mr. Joseph had been in a shooting approximately thirty to forty-five minutes earlier, Mrs. Joseph was the first on the scene following the shooting, and Mrs. Joseph was so upset that after first leaving the scene she returned, crying, to learn of her husband's welfare. In her deposition, Mrs. Joseph said she could not "remember exactly" what she said in her statement to Officer Poulsen. R. Joseph Dep., Supp. App. 93. Even assuming that Mendez knew that Mrs. Joseph had already given a statement, it would not be unusual, or objectively unreasonable, for police to requestion a witness under such circumstances.

As to the length of the detention, based on the facts in the record, no reasonable jury could conclude that Officers Mendez and Zelig were responsible for Mrs. Joseph's presumed three-and-a-half-hour stay in Officer Poulsen's cruiser after she had talked to her husband. *Lippoldt,* – F.3d –, 2006 W L 3200864, at *11; *Scott,* 216 F. 3d at 911. She admitted that she never spoke directly to Mendez, and that Mendez's only involvement was instructing Zelig to have someone interview her. Appellant's App. 948, 958. There is no evidence that Mendez or Zelig knew, or could reasonably have forseen, that this request would entail a multi-hour detention in Officer Poulsen's car, or that either of them had any awareness of Mrs. Joseph's situation after 1:45 a.m. Indeed, Mrs. Joseph expressly admits in her response to the defendants' summary judgment motion that she has no knowledge of either defendant's involvement after this time. *See id.* At 948-49, 958-89.

So far as the record reveals, it was Officer Poulsen – not the

defendants – who was responsible for placing Mrs. Joseph in the police car and who was (along with two other non-defendant officers) aware of her circumstances and the length of time of her detention. Yet she rewarded him for his efforts with thanks and a hug, not with a lawsuit.

If Officer Poulsen were a named defendant, the length of her stay in his car might well require us to reverse the grant of summary judgment. But the sum total of the evidence relating to the two named defendants is that one officer told another to ask Mrs. Joseph to be interviewed, the second officer complied with the first officer's instruction, and then both left the scene. Based on these facts, no reasonable jury could conclude that Mendez and Zelig were the but-for cause of Mrs. Joseph's prolonged stay in Poulsen's car. This absence of predicate facts establishing but-for causation means that Mrs. Joseph has not alleged a constitutional violation attributable to these defendants. Accordingly, Officers Mendez and Zelig are entitled to qualified immunity.

VI. Conclusion

We **AFFIRM** the district court's judgment dismissing Mr. Joseph's cause of action against Mr. Shepherd for failure to state a claim, and the district court's grant of qualified immunity to Mr. Bartlett. We also **AFFIRM** the grant of summary judgment in favor of Salt Lake City because Mr. Joseph's due process cause of action is barred by the doctrine of claim preclusion. And we **AFFIRM** the district court's grant of summary judgment in favor of Lieutenant Zelig and Sargent Mendez on Mrs. Joseph's Fourth Amendment claims.

That leave us with the pending motion in these two cases, which we resolve as follows: we **GRANT** the unopposed motion in case number 05-4181 to seal the briefs and appendices, **GRANT** the motion in 04-4212 to strike the attachments to Mr. Joseph's motion to separate appeals, and **DENY** the motion in 05-4181 to strike the appellee's brief.

Entered for the Court,

Michael W. McConnell
Circuit Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROBERT JOSEPH, et al.
Plaintiffs-Appellants,

v.

DEE DEE CORRADINI, et al.,
Defendants-Appellees.

No. 05-4181
D.C. No. 2:00-CV-340-DAK

ORDER

Before **BRISCOE, HOLLOWAY**, and **MCCONNELL**, Circuit Judges

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Appellants' petitions for rehearing are denied. The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, those petitions are also denied.

Entered for the Court
ELISABETH A. SHUMAKER

by: /s/signature
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT OF UTAH
CENTRAL DIVISION

ROBERT JOSEPH, Plaintiff, SALT LAKE CITY CORP., et al, Defendants.	Memorandum Decision and Order Case no. 2:00cv340

This matter is before the court on (1) the City Defendant's Motion for Summary Judgment as to the claims asserted by Robert Joseph; (2) the City Defendant's Motion for Summary Judgment as to the claims asserted by Rachelle Joseph; and (3) the City Defendant's Sealed Motion for Sanctions. A hearing on the Summary Judgment Motions was held on April 20, 2005. At the hearing, Plaintiffs Robert Joseph ("Mr. Joseph") and Rachelle Joseph (Mrs. Joseph") were represented by D. Bruce Oliver. Defendants were represented by Morris O Haggerty.[1] Before the hearing, the court carefully considered the memoranda and other

1 The City Defendants are Dee Dee Corradini, Ross Anderson, Ruben B. Ortega, Jerry Mendez, A.M. (Mac) Connole, Salt Lake City, Guy Yoshikawa, Roy Wasden, William Shelton, Larry Stott, Charles (Rick) Dinse, Scott D. Folsom, Judy Denker, Mark Zelig, Mark Scharman, Mark Ascerlund, Jason Snow, David Greer, and Zane Swim. The claims against David Greer, however, were previously dismissed by this court's Order dated August 12, 2004.

materials submitted by the parties.[2] Since the hearing, the court has fully considered the law and the facts relating to these motions and it has also considered the letter to the court dated May, 6, 2005 from D. Bruce Oliver and the letter dated May 6, 2005 from Morris O Haggerty. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. Standard of Review

A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure is appropriate when the pleadings, depositions, and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The movant bears an initial burden to demonstrate an absence of evidence to support an essential element of the non-movant's case. If the movant carries this initial burden, the burden then shifts to the non-movant to make a showing sufficient to establish that there is a genuine issue of material fact regarding the existence of that element. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). While the non-movant is entitled to the benefit of whatever reasonable inferences there are in its favor, the reasonableness of those inferences is scrutinized in light of the undisputed facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A genuine dispute exists only if "the evidence is such that a reasonable jury could return a verdict for the moving party." *Anderson*, 477 U.S. at 248. By its very terms, this standard

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2 The court also notes that significant accommodations were made to Plaintiff during the briefing of these motions. After completion of the briefing on the Motion for Summary Judgment pertaining to Mr. Joseph, Plaintiff sought to re-open and conduct further discovery, although the deadline had long-since passed. This request was granted. Plaintiff was also permitted to file an amended opposition memorandum.

provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly alleged factual summary judgment; the requirement is that there is no *genuine* issue of *material* fact." *Anderson*, 477 U.S. 247-48 (emphasis in original).

II. The City Defendants' Motion for Summary Judgment Pertaining to Robert Joseph's Claims

The material facts that underlie this action are not disputed. On March 26, 1999, Mr. Joseph, an off-duty Salt Lake City Police Officer, pulled over a speeding driver. The specific details of the stop, the driver's attempt to flee, and the eleven shots fired by Mr. Joseph at the motorist are not relevant for purposes of deciding the instant motion. Mr. Joseph was later terminated from his employment for unjustified use of deadly force during the incident. His termination was later changed to a 20-day suspension, and Mr. Joseph was then reinstated, subject to a fitness-for-duty exam. After the fitness-for-duty examination, the psychiatrist determined that Mr. Joseph that Mr. Joseph was not fit for duty. Consequently, he was terminated.

A criminal charge was filed against Mr. Joseph based on his conduct. However, the prosecutor, Ernest Jones, subsequently made the decision not to pursue the case because there was conflicting evidence, and Mr. Jones did not think he could prove beyond a reasonable doubt that Mr. Joseph was unjustified in firing his gun eleven times at the motorist.[3] Joseph brought two actions concerning these matters through the available Salt Lake City Civil Service administrative process. He then appealed adverse results in both proceedings to the Utah Court of Appeals, where the court ruled in favor of the City. Mr. Joseph then sought certiorari in the Utah Supreme Court and the U.S. Supreme Court,

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3 Mr. Joseph repeatedly asserts that the criminal case against him was dismissed because the court found that he was justified in his use of force. The court, however, never made such a finding.

both of which declined to hear his claims.

In this action, Mr. Joseph has alleged several claims against the City Defendants. In his first Cause of Action, he asserts four counts: Count I – Malicious Prosecution; Count II and III – Violation of Due Process Arising Out of Suspension/Termination; Count IV – Violation of Due Process – Supervise and Remedy. In his Second Cause of Action, he asserts a Conspiracy to Deprive and to Obstruct Justice. In his Third Cause of Action, he asserts a RICO claim. The City Defendants argue that all of these claims should be dismissed.

A. First Cause of Action – Malicious Prosecution.

The City Defendants argue that Count I should be dismissed against them because the County-not the City-initiated the criminal proceedings. The only City Defendant involved in the filing the Information and testifying at the preliminary hearing was Sergeant Mendez. The County made the decision to prosecute and later made the decision to terminate Mr. Joseph's employment. Thus, with the exception of Mendez, no one at the City of involved. The City further argues that the undisputed facts demonstrate that Mendez had no ability to affect the decision. In addition, the City Defendants argue that the finding of probable cause broke the chain of causation, and thus, Joseph has failed to state a claim for malicious prosecution.

Mr. Joseph, on the other hand, contends that Mendez was very prejudiced against him based on the fact that when Mendez arrived on the scene, he made a statement to the effect of "this shoot doesn't smell right." Mr. Joseph repeatedly highlights this statement to demonstrate that Mendez was "out to get him" from the beginning of the incident.

Mr. Joseph's malicious prosecution claim, brought pursuant to 42 U.S.C. § 1983 (Section 1983) must be dismissed. There is no evidence that any of the City Defendants–except for Mr. Mendez–were involved in the prosecution. Further, regarding Mr. Mendez, there is no evidence that he initiated or procured the prosecution, nor is there any evidence that he provided false testimony or that he ever concealed any evidence. In light of

Plaintiff's lack of evidence and the subsequent finding of probable cause by the state court, Plaintiff's claim must be dismissed.

Moreover, Plaintiff has failed to provide any authority for the proposition that a plaintiff may prevail on a Section 1983 malicious prosecution claim absent incarceration or a trial. While the specific requirements of a Section 1983 malicious prosecution claim remain unclear, the court is unaware of any case in which a Section 1983 malicious prosecution claim succeeded when the facts did not involve incarceration or a trial of the defendant. Thus, even if Mr. Joseph had marshaled more damaging evidence–which he did not–he could not prevail on a Section 1983 malicious prosecution claim in any event because the charges against him were dismissed prior to trial, and there is no evidence that he was ever incarcerated.

B. First Cause of Action–Counts II and III–Violation of Due Process Arising Out of Suspension/Termination

For purposes of this motion, the City Defendants agree that Mr. Joseph and a property interest in his employment that could only be terminated after receiving due process. Thus, they concede for purposes of this motion that he had a liberty interest that could not be terminated without due process. The City Defendants argue, however, that the undisputed facts demonstrate that Mr. Joseph received all the process to which he was entitled (or waived the process that was offered to him) regarding both his 20-day suspension and his eventual termination.

Mr. Joseph was entitled to challenge employment decisions by appealing to the Salt Lake Cit Civil Service Commission (the "Commission"). Mr. Joseph did so. *See Joseph v. Salt Lake City Civil Serv. Comm'n et al.*, 2002 UT App 254, 53 P.3d 11 (Utah Ct. App. 2002). With regard to his appeals to the Commission, Mr. Joseph was afforded the full panoply of due process–a hearing with attorney representation, the right to cross-examine witnesses, the right to call his own witnesses, etc. With regard to his

suspension, he availed himself of these procedures.[4] However, with regard to his termination, Mr. Joseph chose to not comply with the required procedures of the Commission when he refused to answer discovery, resulting in dismissal of his appeal and a waiver of his due process rights. Thus, Mr. Joseph either received full due process or waived his rights to it. Thus, he has no claim for a violation of his due process rights regarding his suspension or his termination.

Additionally, Mr. Joseph's due process claims are barred for a second reason–the claim preclusion branch of res judicata. First, he challenged the hearing he received regarding his suspension by taking an appeal to the Utah Court of Appeals. In that appeal, he raised numerous perceived procedural defects. His challenges were denied, and the Commission's decision was affirmed. Second, he challenged the ruling of the Commission regarding his termination by appealing that decision to the Utah Court of Appeals. He specifically sought a ruling that his due process rights were violated. The Utah Court of Appeals found that "the Commission did not violate Joseph's due process right to a post-deprivation hearing." Joseph appealed both decisions to the Utah Supreme Court and to the United States Supreme Court, but neither court granted certiorari. Thus, Mr. Joseph is now precluded from further actions asserting due process violations. *See Strickland v. City of Albuquerque*, 130 F.3d 1408 (10th Cir. 1997); *Career Serv. Review Bd. v. Utah Dep't of Corrections*, 942

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4 Mr. Joseph argues that evidence against him was concealed, and thus the hearings were tainted. However, in *Tonkovich v. Kansas Bd. Of Regents*, 159 F.3d 504, 520 (10th Cir. 1998), the court found that "[t]he fact that [plaintiff] was unable to discover every piece of evidence is of no consequence as a matter of due process. The Due Process Clause does not guarantee that parties to an adversarial proceeding may discovery every piece of evidence they desire. Further, even assuming that evidence was concealed, which is disputed, there is no indication whatsoever that the allegedly "concealed" evidence would have made any difference in the Commission's determinations.

P.2d 933, 938 (Utah 1997).

C. First Cause of Action–Counts IV–Violation of Due Process–Supervise and Remedy

Mr. Joseph's First Cause of Action–Count IV seeks to make certain City Defendants liable for failure to investigate Mr. Joseph's allegations of corruption and for not adequately supervising and training employees. This claim fails because there has been no underlying constitutional violation by any employee, and thus there can be no violation of a duty to supervise and train.

D. Second Cause of Action–Conspiracy to Deprive and to Obstruct Justice

Mr. Joseph has asserted a claim for violations of 42 U.S.C. § 1985(2) and (3) ("Section 1985"). However, he has not created a disputed fact regarding any racial or other class-based invidious discriminatory animus behind the alleged conspirators' actions. While he has asserted that he is Lebanese and that he was discriminated against on this basis, he offers not one shred of evidence to support such a claim. Indeed, his other factual assertions belie such a claim. Thus, his claims pursuant to Section 1985 are dismissed.

E. Third Cause of Action–RICO

Mr. Joseph's Third Cause of Action for a violation of RICO, 18 U.S.C. § 1962, is dismissed because he has failed to allege that the City Defendants violated RICO, and the undisputed facts demonstrate that no racketeering activity occurred in any event.[5]

III. The City Defendants' Motion for Summary Judgment Pertaining to Rachelle Joseph

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5 This decision does not preclude Trace Taylor from seeking civil or criminal remedies regarding the alleged threats made to her during discovery in this action.

A. Background

Rachelle Joseph is the wife of Robert Joseph. At approximately 1:00 a.m. on March 26, 1999, Rachelle–accompanied by her stepson–met Mr. Joseph at Liberty Park to obtain a key to their house, as there other children had gone to bed and had inadvertently locked Mrs. Joseph out of the house. While meeting her husband, she observed a car pass by at a high rate of speed. She asked her husband, who was off duty, to stop the car. Mr. Joseph pursued the speeder and various events occurred leading him to fire his weapon at the motorist 11 times. Several minutes later, Mrs. Joseph arrived at the scene. She saw her husband and backed up her car to speak with him. He told her he had just been in "a police shooting." She was the first person on the scene. She then left, proceeding to the freeway. She then saw police cars go by with lights and sirens on, and thus she decided to go back to make sure that her husband was okay.

By that time, the street was cordoned off. She was met by Officer Poulsen, who was directing traffic. She told him that she was Mr. Joseph's wife. He asked her to park her car and then get into his police car so that he could transport her to the shooting scene to talk to her husband. Ms. Joseph was upset and crying. She had seen an ambulance go to the scene, which scared her. She wanted to know what was going on with her husband. Officer Poulsen told her that he thought that Mr. Joseph was okay. She believes that Officer Poulsen said that the police would take her statement.

The timing of subsequent events is disputed. After an uncertain amount of time, Officer Poulsen took her statement. After sitting in the car for approximately 30-45 minutes, Lt. Zelig came over to Officer Poulsen and that Sargeant Mendez wanted to have Mrs. Joseph taken to the police station to be interviewed. According to the City Defendants, Mrs. Joseph was cooperating with the police to convey the factual information she had. She was willing to wait around to convey that information. Officer Poulsen did not recall that Mrs. Joseph stated that she wanted to leave, and she never actually tried to leave. Although Mrs. Joseph claims that she told "everyone" that she wanted to leave, no officer at the scene

remembers such a request.

At some point, she saw and spoke to her husband. The City Defendants claim that Mrs. Joseph testified in her deposition that she spoke to Mr. Joseph toward the end of the period of her alleged detention. They also provide evidence that Mr. Joseph left the scene prior to 2:59 a.m. because he filled out a report at the Salt Lake City Police Headquarters building at that time. Thus, the City Defendants claim, Mrs. Joseph left prior to 3:00 a.m. Mrs. Joseph is unsure of when she arrived home, but believes it was around 5:00 a.m.

At some point, when Sgt. Mendez learned that Mrs. Joseph was not a direct witness to the shooting, he stated that she could be interviewed at a later date. Officer Wooldridge then told Mrs. Joseph that she could be released. According to the City, "release" was used in the sense that the police would not be asking her to stay, not in the sense that she had previously been detained. Sgt. Mendez had never asked Wooldride to detain Rachelle, nor did Officer Wooldridge detain her. Officer Wooldridge left the scene of the shooting at 2:25.

Essentially, the City Defendants claim that the officers at the scene merely tried to help comfort Mrs. Joseph, and they sought to obtain her version of what happened. They claim that she arrived on the scene at approximately 1:00 a.m. and that Officer Poulsen then comforted her and took her to her husband as soon as he was relieved from his duty directing traffic. Officer Poulsen knew that the Josephs' other children were home alone, so he called dispatch to arrange for someone to go stay with the children.[6] Although the officers sought to discover what Mrs. Joseph knew, they claim that they quickly determined that she had not witnessed the shooting, and therefore her information was of limited value. The City Defendants claim that Mrs. Joseph wanted to stay until she

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6 Officer Poulsen was intentionally not named a s a defendant in this action because, according to Mrs. Joseph, he had nothing to do with the alleged detention. Mrs. Joseph believes that he was only following instructions from someone else to hold her.

had verified that her husband was okay, and then she left, sometime between 2:30 and 3:00. The City Defendants claim that she never asked to leave.

Mrs. Joseph, on the other hand, claims that she was unlawfully detained until approximately 5:00 a.m. (For approximately four hours), even though she kept telling the officers at the scene that her other kids were home alone and that she did not know anything. She contends that even her husband told the officers to let her go and that she repeatedly asked to be let go. She essentially argues that the officers wanted to punish her for her husband's "bad shoot."

B. Discussion

The City Defendants have moved for summary judgment as to the three claims asserted by Rachelle Joseph. First, she has asserted a claim for Unlawful Detention/False Arrest/Wrongful Imprisonment. Second, she has a claim for "Denial of Property–Wrongful Termination," based on her husband's loss of a job. Finally, she has asserted a RICO claim. In responding to the motion, Plaintiff did not addressed either the Second or Third claims, which the City understood to be a concession that those claims may be dismissed.

In addition, Mrs. Joseph appears to concede that her First Cause of Action is asserted against only Defendants Zelig and Mendez, and thus the remaining individual defendants and the City are dismissed.

The remaining City Defendants argue that Mrs. Joseph's alleged detention did not rise to the level of a seizure because she was at the shooting scene voluntarily, she was waiting to make sure her husband was okay, and a reasonable person would not feel that they were not free to leave in these circumstances. Moreover, even if the undisputed facts supported the fact that Mrs. Joseph reasonably perceived that she was being detained, the City Defendants contend that the actions of the officers were reasonable under the circumstances. Further, there is no clearly established law preventing the brief detention of witnesses to obtain statements.

Although there is a dispute as to the length of time Mrs. Joseph was at the scene of the shooting, and the court is not permitted to make factual determinations in the context of a summary judgment motion, the court nonetheless agrees with the City Defendants that no reasonable jury could conclude that the police conduct in this case would have communicated to a reasonable person that she had been detained. Moreover, even if the undisputed facts supported the fact that Mrs. Joseph reasonably perceived that she was being detained, the actions of the officers were reasonable under the circumstances. Mrs. Joseph had indicated that she was the first on the scene, and it was reasonable for the officers to seek to question her. They understandably had certain duties that they were required to attend to before they could assist Mrs. Joseph in talking with her husband. There is no indication that the detention was painful, degrading, or unduly prolonged. There is no evidence that the officers used or threatened to use any force or that they made threatening statements. There is no evidence that the officers unnecessarily detained her after they learned that she had not seen the actual incident.

In addition, there is no clearly established law regarding the length of time an officer may request that a witness stay for questioning. Thus, even assuming that Mrs. Joseph was actually detained at the scene of the shooting for over four hours, against her will, the remaining defendants would have qualified immunity for their actions. Accordingly, her claim for unlawful detention is dismissed.

IV. The City Defendants' Sealed Motion for Sanctions

In May of 2003, the City Defendants filed a memorandum in opposition to Plaintiff's Motion for Sanctions for Attorney Misconduct. In their memorandum, the City Defendants set forth more than ten pages of facts related to Plaintiff's vexatious, mean-spirited, baseless, and unreasonable ad hominem attacks against counsel for the City Defendants. On July 17, 2003, this court issued an Order denying Plaintiff's Motion for Sanctions for Attorney Misconduct and admonishing Plaintiff that the court

was:

> . . . deeply troubled by the baseless and scurrilous allegations of criminal and professional misconduct asserted by Plaintiff's counsel against both [of Defendants' attorneys] in the instant motion and by Plaintiff's counsel's routine practice of including in his pleadings ad hominem attacks and/or allegations or criminal or professional misconduct regarding opposing counsel or their clients. Plaintiff and/or his counsel have generally not conducted this litigation with an appropriate level of civility toward opposing counsel and their clients.

In the Order, the court further stated that "this court hereby admonishes Plaintiff and his counsel that further unreasonable and vexatious conduct will not be tolerated" and that "Plaintiff and his counsel are also hereby notified that the failure to put an end to the uncivil nature of this litigation could result in dismissal of the entire action."

In the City Defendants' Sealed Motion for Sanctions, they have provided evidence that Mr. Joseph has continued to make false and extremely negative comments to various Defendants (and others) about one of their attorneys–an attorney who, to the court's knowledge, maintains an impeccable reputation for professionalism, civility, and ethical conduct. Not only has Mr. Joseph discredited this attorney by telling various people, including various Defendants that their attorney suborned perjury and was "part of the crime," among other things, but he has also contacted these individual Defendants without their counsel being present, and through his statements, has significantly interfered with this individual's ability to defend this case and to maintain the attorney-client relationship.

This court has previous warned Plaintiff and his counsel that such conduct would not be tolerated. The court hereby dismisses Mr. Joseph's claims not only on the merits, as discussed above, but also as a sanction for his unacceptable conduct even after having been warned about the consequences of such conduct.

Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that the City Defendants' Motion for Summary Judgment Regarding the Claims of Robert Joseph is GRANTED. The claims asserted by Robert Joseph against the City Defendants are DISMISSED with prejudice. The City Defendants' Motion for Summary Judgment As to the Claims of Rachelle Joseph is GRANTED. The claims asserted by Rachelle Joseph against the City Defendants' Sealed Motion for Sanctions is GRANTED. The claims asserted by Robert Joseph are DISMISSED on this independent basis. Because there are no remaining claims against any Defendants, this action is hereby DISMISSED. Any non-dispositive motions remaining on the docket are MOOT. The trial date and any other remaining dates are hereby VACATED.

DATED this 8th day of July, 2005.

BY THE COURT:

/s/Dale A. Kimball
DALE A. KIMBALL
United States District Judge

IN THE UNITED STATES DISTRICT COURT OF UTAH
CENTRAL DIVISION

ROBERT JOSEPH, Plaintiff, SALT LAKE CITY CORP., et al, Defendants.	ORDER Case no. 2:00cv340

This matter is before the court on (1) Defendant Utah Attorney General's Office's Motion to Dismiss Amended complaint; (2) Utah Attorney General's Office's Motion to Strike; (3) Defendant Dick Shepherd's Motion to Dismiss; (4) Defendant Steve Bartlett's Motion to Dismiss; (5) Defendant Bartlett's Motion to Strike; (6) Plaintiff's Motion for Leave to Conduct Discovery; (7) Plaintiff's Motion for Sanctions for Attorney Misconduct; (8) Defendant Salt Lake City Defendants' Motion to Strike Motion for Sanctions for Attorney Misconduct and Motion for Relief; (9) Plaintiff's Motion for Summary Judgment Against Attorney General's Office; and (10) Plaintiff's Motion to File In Camera Plaintiff's Addenda Supporting Plaintiff's Motion for Summary Judgment Against the Attorney General.[1]

A hearing on the motions was held on June 23, 2003. At the hearing, Defendant Attorney General's Office was represented by Peter L. Rognlie and Peggy Stone; Defendants Dick Shepherd

1 The last two motions listed (numbers 9 & 10) were not argued at the June 23, 2003 hearing but are ripe for decision by the court at this time.

("Shepherd") and Steve Bartlett ("Bartlett") were represented by T. J. Tsakalos; The Salt Lake City Defendants (the "City Defendants") were represented by Steven W. Allred and Martha S. Stonebrook; Plaintiff Robert Joseph ("Plaintiff") was represented by D. Bruce Oliver. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the motions under advisement, the court has further considered the law and facts relating to these motions. Now being fully advised, the court renders the following Order.

I. ATTORNEY GENERAL'S OFFICE'S MOTION TO DISMISS (# 103) AND MOTION TO STRIKE (# 132)

The Attorney General's Office argues that it should be dismissed because, among other reasons, it is entitled to 11th Amendment Immunity and because it is not a "person" for purposes of 42 U.S.C. § 1983 and § 1985.

The court agrees that the Attorney General's Office must be dismissed from this action on the following grounds: (1) the Attorney General's Office is immune from suit in federal court, and Plaintiff has not demonstrated that the State has waived its 11th Amendment immunity, (2) the Attorney General's Office is not a "person" amenable to suit under § 1983; (3) Plaintiff has failed to state a claim because there is no § 1983 liability for violation of a state statute, (4) the state statute relied upon by Plaintiff is inapplicable to the facts at issue in this case; (5) *Ex Parte Young* does not apply to the claims against the Utah Attorney General's Office because it is not a "state official" under *Ex Parte Young* and because Plaintiff does not seek the declaratory or prospective injunctive relief contemplated by *Ex Parte Young*.

Because the court has not relied on any of the attachments that the Attorney General's Office has moved to have stricken, the motion to strike is moot.

II. DEFENDANT DICK SHEPHERD'S MOTION TO DISMISS (#108)

The court finds that Defendant Dick Shepherd is entitled to dismissal from this action because (1) prosecutorial immunity is an absolute bar and precludes any of the claims against him; (2) Plaintiff's claims are barred by the doctrine of claim preclusion; (3) Plaintiff's claims are barred by the doctrine of issue preclusion; and (4) Plaintiff has failed to state a claim against him because the January 18, 2000 letter about which Plaintiff complains does not support any claim against him.

III. DEFENDANT STEVE BARTLETT'S MOTION TO DISMISS (#118) AND MOTION TO STRIKE (#142)

The court finds that the claims against Defendant Bartlett are dismissed because (1) claims are barred by the doctrines of claim preclusion and issue preclusion, (2) Bartlett is entitled to prosecutorial immunity; and (3) even if he is not entitled to prosecutorial immunity, he is entitled to qualified immunity.

Because the court has not relied on Addendum C, E, H, or I in reaching its determination, it is not necessary for the court to decide whether to strike these documents from Plaintiff's Opposition Memorandum.

IV. PLAINTIFF'S MOTION FOR LEAVE TO CONDUCT DISCOVERY (#137)

All parties submitted this motion for the court to decide based on the briefs. Under Rule 26(d) of the Federal Rules of Civil Procedure ("FRCP"), discovery is generally not permitted until the parties have conferred as required by FRCP 26(f). Plaintiff, however, seeks to conduct discovery prior to the Attorney's Planning Meeting. The court finds that there is no good cause for permitting discovery prior to the time frame set forth in FRCP 26(d).

V. PLAINTIFF'S MOTION FOR SANCTIONS FOR ATTORNEY MISCONDUCT (#139) AND CITY DEFENDANT'S MOTION TO STRIKE MOTION FOR SANCTION FOR ATTORNEY MISCONDUCT

AND MOTION FOR RELIEF (#152)[2]

Salt Lake City Corporation (the "City") had previously retained Roger Bullock of Strong & Hanni to represent Mr. Joseph in Wesley Scott's action against Plaintiff Joseph and the City. The Agreement between the City and Mr. Bullock provides that "all documents and records produced by the Attorney in connection with this Agreement shall become and remain the property of the City," unless contrary to the attorney-client privilege. It also provides that, at the completion of the services under the Agreement, all such documents, data, and records shall, at the option of the City, be arranged, indexed, and delivered to the City.

On or about September 16, 2002, the City Defendants filed a motion to stay the instant proceedings until the court had ruled on Plaintiff's Motion to Amend Complaint. This court granted the stay on September 23, 2002. Apparently prior to receiving the court's Order, Plaintiff had issued a subpoena to Mr. Bullock for his billing and correspondence files. Mr. Bullock notified Ms. Stonebrook that he had received the subpoena, and Ms. Stonebrook prepared a motion to quash the subpoena, based upon this court's Order staying all proceedings. The court granted Ms. Stonebrook's motion. Pursuant to the Agreement between the City and Mr. Bullock, the City requested delivery of all documents in the *Scott v. Joseph* case. Mr. Bullock complied.

A. Plaintiff's Arguments

Plaintiff seeks $50,000 in sanctions against Ms. Stonebrook and/or the City for violating the local rules regarding honesty and

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2 The Attorney General's Office has joined in the City's request that this court impose relief to deter Plaintiff's future efforts to harass, annoy, vex, and embarrass. The Attorney General's Office points out that it has previously called the court's attention to Plaintiff's ad hominem attacks on other counsel to embarrass or harass them. Additionally, Defendants Bartlett and Shepherd also join in this portion of the City Defendants' motion.

fidelity, obstruction of justice pursuant to 18 U.S.C. § 1512 (b) (witness tampering and using intimidation to corruptly persuade another to withhold documents or testimony), and Utah Rule of Professional Conduct 8.4(a) and (b) (inducement of another to engage in misconduct and engaging in conduct that is prejudicial to the administration of justice). Plaintiff also claims that the motion is based on violations of the 1st and 14th Amendments to the United States Constitution. He contends that the integrity of the files is "forever destroyed." He also claims that he should be able to present this conduct to the jury as part of its "pattern of racketeering activities" for purposes of Plaintiff's RICO claims against Defendants.

B. The City Defendants' Arguments

In response, the City Defendants request that this court strike Plaintiff's Motion for Sanctions because of its conclusory and baseless, scandalous assertions against Ms. Stonebrook, and they request that this court craft some remedy to prevent the uncivil way in which Plaintiff and his counsel have litigated this case.

The City Defendants first set forth a brief history of Joseph's termination, which is a the heart of the instant lawsuit. The following history is set forth in an opinion from the Utah Court of Appeals in *Joseph v. Salt Lake City Civil Service Commission*, 2002 UT App. 254 ¶ 2, 53 P.3d 11:

> In March of 1999, Joseph was involved in an incident that resulted in the Salt Lake City Police Department (the City) determining that he had acted unprofessionally and had violated the City's deadly force policy. While this finding was later affirmed by the Commission, Joseph was permitted to continue his employment pending the results of a fitness for duty examination. Thus, Joseph was examined by Dr. David McCann, who in March of 2000, submitted to the City the following conclusions regarding Joseph:
>
> [He] has Disordered Personality Traits which have

> contributed to him placing himself in jeopardy in the shooting incident and other incidents. His personality traits have caused him to be excessively self-centered and unwilling to learn from peers or superiors. His personality traits are likely to lead him to increased isolation and alienation from appropriate professional supervision and the needs of the citizens of Salt Lake City. Personality traits similar to those of Officer Joseph's are notably resistant to psychotherapeutic intervention, additional training, closer supervision or disciplinary action. His personality traits cause an increased risk for harm to himself, to other officers and to the citizens of Salt Lake City. In [Dr. McCann's] opinion, Officer Joseph is not psychologically suitable to perform the duties of a police officer.[3]

Based at least in part on this evaluation, the City's Chief of Police, Mac Connole, terminated Joseph's employment. The Utah Court of Appeals upheld the Civil Service Commission's determination, and the Utah Supreme Court denied certiorari. Plaintiff has apparently filed a petition for certiorari with the United States Supreme Court.

The City Defendants claim that, as a result of this termination, Plaintiff has engaged in a relentless barrage of judicial, administrative, and public efforts to punish the City, its employees, and others who he perceives to have waged a secret and conspiratorial attack on him. The City Defendants cite several examples of Plaintiff's practice of name-calling, allegations of

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3 The fact the Mr. Allred repeated this language from the Utah Court of Appeals' opinion becomes the basis (in Plaintiff's reply memo) for plaintiff's unreasonable assertion that Mr. Allred has now engaged in criminal conduct and should be sanction $250,000.

criminal and professional misconduct, and a general uncivil diatribe in his various litigations involving the City's attorneys.

The City Defendants argue that the litany of invectives should be stricken pursuant to FRCP 12(f) as "immaterial, impertinent, or scandalous." They argue that Plaintiff's conclusory assertions of criminal and unprofessional conduct regarding Ms. Stonebrook do not support Plaintiff's position. The highlight the fact the Plaintiff has never made a request for documents to the City. Further, the City Defendants point out that Plaintiff seeks to use this conduct as evidence of a RICO violation, but of the eight individual claims for RICO violations, none is asserted against the City. They seek to have all the conclusory statements regarding Ms. Stonebrook stricken as scandalous and as sullying the professional reputation of Ms. Stonebrook.

The City Defendants contend that aside from the scandalous and unmitigated personal attacks on Ms. Stonebrook, Plaintiff's counsel demonstrates an "unfortunate display of misinformation at best, or fabrication at worst." They claim that Ms. Stonebrook has done noting to destroy the evidence, and in fact, the file is in the same form and condition as it was when delivered to her.

The City Defendants also point out that, while Plaintiff asserts in his motion a violation of 18 U.S.C. § 1512(b) (witness tampering), he does not appear to have alleged such a claim in his Amended Complaint. Further, he has not alleged that Mr. Bullock withheld testimony or changed his testimony or tampered with evidence. Thus, there are no facts to support a § 1512(b) claim.

Finally, the City Defendants appeal to the court for some relief from past and future harassment by Plaintiff. They ask that the court consider relief under FRCP 11, 28 USC § 1927, or such other inherent powers of the court.

C. Plaintiff's Response to the City Defendants' Motion

As a perfect demonstration of the vexatious and ever-moving target with which the City Defendants (and other Defendants) have had to contend in this litigation, Plaintiff claims in his reply memorandum that Plaintiff had a right to privacy concerning his

personal and sensitive health information, i.e., his psychological exam by Dr. McCann. He argues that the City Defendants have continually failed to recognize this, and now the Utah Court of Appeals has quoted from this allegedly sensitive health information. Plaintiff now contends that such disclosure by the City Defendants is a violation of HIPAA. He claims that HIPAA criminalizes knowing and willful disclosures of identifiable health information and that Mr. Allred, in the City's Motion to Strike, has made "absurd and outlandish derogatory claims against Officer Joseph." Plaintiff claims that Mr. Allred has now enaged in criminal wrongdoing himself in defending Ms. Stonebrook's criminal conduct because Mr. Allred has "attempted to purport to this court that Officer Joseph is crazy and harassing Ms. Stonebrook." According to Plaintiff, Mr. Allred has also committed another crime by wilfully and knowingly disclosing Mr. Joseph's health information to the court in a public record. Accordingly, Plaintiff requests that this court find that probable cause exists that Mr. Allred has violated Mr. Joseph's privacy with malicious harm and refer the matter to the United States Attorney's Office for screening for criminal charges. He claims that, if found guilty, Mr. Allred could be fined up to $250,000 and/or imprisoned for up to 10 years. Plaintiff also seeks $250,000 in sanctions against Mr. Allred for this wrongful disclosure.

D. City Defendants' Reply

The City Defendants appropriately point out that Plaintiff failed to respond to their motion to strike and for other relief, and improperly brought up an entirely new argument about HIPAA violations, which was never mentioned before in Plaintiff's Motion for Sanctions for Attorney Misconduct.

The City Defendants also point out that Plaintiff has also included a "Statement of Facts" that is comprised of unsupported conclusions and allegations. They explain that they have not disclosed any information to which Plaintiff had an expectation of privacy. They also note that in the litigation between Wesley Scott and Mr. Joseph, the city requested that all parties enter into a

Stipulated Confidentiality Agreement and Protective Order regarding various internal affairs files and psychological information pertaining to Joseph. Joseph's counsel declined and stated in a letter that "Rob Joseph does not require a protective order." In Plaintiff's Civil Service Commission proceedings, Plaintiff was represented by two separate, competent attorneys, and at no time did either one seek to seal Dr. McCann's evaluation. On appeal, the City was required to forward the Civil Service record to the Utah Court of Appeals, including the City's response to the appeal, which contained Dr. McCann's conclusion.[4] Again, Plaintiff took no action to seal such material until *after* the Court of Appeals issued its opinion. The Court of Appeals declined Plaintiff's invitation to redact the quoted provision from its opinion.

In addition to Plaintiff's failure to protect any health information that he wanted to keep private, the City Defendants contend that they could not be liable for disclosure in any event because HIPAA is inapplicable for a variety of reasons: (1) HIPAA's privacy rules were not in effect at the relevant times (the relevant portion of HIPAA did not go into effect until April 2003); (2) HIPAA does not apply in these circumstances because the City is not a "covered entity" and no part of its City-administered health plan was made public. The fitness for duty evaluation was not administered through the City's health plan, but for employment-qualification purposes; and (3) HIPAA does not provide a private cause of action.

E. Discussion

The City Defendants' Motions to Strike Motion for Sanctions for Attorney Misconduct and Motion for Relief is granted, and

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4 The City Defendants point out that they did not refer to his evaluation in their brief; rather it stated that "on April 19, 2000, the City filed its response to the [Civil Service Commission] Appeal. The Court of Appeals *sua sponte* searched the record for Dr. McCann's conclusion.

Plaintiff's Motion for Sanctions for Attorney Misconduct is hereby stricken. The documents requested from Mr. Bullock were the property of the City and were properly given to the City by Mr. Bullock. Plaintiff has not made a request for the documents from the City (nor could such a request be made until the appropriate time under FRCP 26(d)). Contrary to Plaintiff's counsel's sensational assertions, the court finds that there is no evidence indication that there was anything nefarious about the conduct of the City Defendants' counsel relating to this incident. Further, the court is deeply troubled by the baseless and scurrilous allegations of criminal and professional misconduct asserted by Plaintiff's counsel against both Ms. Stonebrook and Mr. Allred in the instant motion and by Plaintiff's counsel's routine practice of including in his pleadings ad hominem attacks and/or allegations or criminal or professional misconduct regarding opposing counsel or their clients. Plaintiff and/or his counsel have generally not conducted this litigation with an appropriate level of civility toward opposing counsel and their clients.

In addition, Plaintiff's counsel has made this complex litigation more burdensome than it needs to be by including significant amounts of scandalous and impertinent materials in virtually all of his filings, by naming defendants that clearly should never have been named, by bringing clams that are entirely unsupported, by asserting new claims in virtually every new filing, and by filing entirely unreasonable motions that consume the valuable resources of the court and opposing counsel and their clients.

The court, therefore, is compelled to take some action to prevent such vexatious litigation tactics from continuing in this three-year-old litigation. Pursuant to 28 U.S.C. § 1927[5], FRCP 11,

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5 This statute provides:

Counsel's liability for excessive costs.

Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may

FRCP 16(f), and the inherent powers of the court, this court hereby admonishes Plaintiff and his counsel that further unreasonable and vexatious conduct will not be tolerated. Upon motion by any Defendant, or upon the court's own motion, Plaintiff and his counsel will be responsible for any attorneys' fees incurred by Defendants in responding to any such unreasonable and/or vexatious conduct. Moreover, any further filings by Plaintiff that contain accusations of criminal or unprofessional conduct–or any other ad hominem attacks against counsel or their clients– that are made without concrete supporting facts and direct legal support will be stricken from the record upon motion by a relevant Defendant or on the court's own motion, and Plaintiff's counsel will be fined. Plaintiff and his counsel are also hereby notified that the failure to put an end to the uncivil nature of this litigation could result in dismissal of the entire action.

VI. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST THE ATTORNEY GENERAL'S OFFICE (#146) AND PLAINTIFF'S MOTION TO FILE IN CAMERA PLAINTIFF'S ADDENDA SUPPORTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST THE ATTORNEY GENERAL (#148)

Because the court has dismissed the Attorney General's Office as a Defendant in this action, Plaintiff's Motion for Summary Judgment Against the Attorney General's Office and Plaintiff's Motion to File In Camera Plaintiff's Addenda Supporting Plaintiff's Motion for Summary Judgment Against the Attorney

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be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

General are denied as moot.[6]

VII. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

(1) Defendant Utah Attorney General's Office's Motion to Dismiss Amended Complaint (docket #103) is GRANTED, and the Attorney General's Office is DISMISSED as a Defendant in this action;

(2) Utah Attorney General's Office's Motion to Strike (docket #132) is DENIED AS MOOT;

(3) Defendant Dick Shepherd's Motion to Dismiss (docket #108) is GRANTED, and Mr. Shepherd is DISMISSED as a Defendant in this action;

(4) Defendant Steve Bartlett's Motion to Dismiss (docket #118) is GRANTED, and MR. Bartlett is DISMISSED as a Defendant in this action;

(5) Defendant Bartlett's Motion to Strike (docket # 142) is DENIED AS MOOT;

(6) Plaintiff's Motion for Leave to Conduct Discovery (docket #137) is DENIED;

(7) Plaintiff's Motion for Sanctions for Attorney Misconduct (docket #139) is STICKEN;

(8) The City Defendants' Motion to Strike Motion for Sanctions for Attorney Misconduct and Motion for Relief (docket #152) is GRANTED, as are Defendants Bartlett and Shepherd's Joinder in the Motion for Relief (docket #161) and the Attorney General's

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6 Plaintiff sent a letter to this court on July 7, 2003, regarding "Notice of Default and Request for Ruling" on Plaintiff's Motion for summary Judgment Against the Attorney General's Office. Plaintiff indicated in the letter that the Attorney General's Office had until June 23, 2003 to respond, but had failed to do so. However, on May 23, 2003, the court granted the Attorney General's Office's motion for an enlargement of time, and permitted the Attorney General's Office to delay its response to Plaintiff's Motion for Summary Judgment until 30 days after the ruling on its Motion to Dismiss. *See* Order dated May 23, 2003.

Office joinder in the Motion for Relief (docket #189). As stated above, Plaintiff's Motion for Sanctions for Attorney Misconduct is STRICKEN, and Plaintiff is admonished that further uncivil conduct could result in pleadings being stricken, monetary sanctions being imposed, and/or dismissal of the action, as set forth above;

(9) Plaintiff's Motion for Summary Judgment Against Attorney General's Office (docket # 146) is DENIED AS MOOT; and

(10) Plaintiff's Motion to File In Camera Plaintiff's Addenda Supporting Plaintiff's Motion for Summary Judgment Against the Attorney General (docket #148) is DENIED AS MOOT.

DATED this 17th day of July, 2003.

BY THE COURT:

s/ Dale A. Kimball

DALE A. KIMBALL
United States District Judge

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court

February 25, 2004

Sheriff Aaron D. Kennard
Salt Lake County Sheriff
2001 South State Street #S-2700
Salt Lake City, Utah 84190

Re: Grand Jury Findings - Request for Criminal Investigation

Dear Sheriff Kennard:

On January 08, 2004 the State grand Jury Panel heard evidence of obstruction of justice, perjury, false and inconsistent material statements, the suborning of perjury, official misconduct and spoliation of evidence from former Salt Lake City Police Officer Robert Joseph who was wrongfully charged after an office involved shooting in Salt Lake City on March 26, 1999. Upon hearing testimony from Mr. Joseph and reviewing the evidence presented to the Panel, the Panel has determined that there is enough evidence to warrant an investigation by your office. The Grand Jury hereby requests that a criminal investigation be commenced by your office. Please feel free to contact the Grand Jury Panel's Secretariat, D. Mark Jones if you have any questions at 578-3971. We appreciate you conducting this investigation.

Sincerely,

/s/Stanton Taylor
Judge Stanton Taylor
Supervising Judge
Grand Jury Panel

D. BRUCE OLIVER
A LIMITED LIABILITY COMPANY
ATTORNEY AT LAW

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180 SOUTH 300 WEST, SUITE 210
SALT LAKE CITY, UTAH 84101-1490
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AREA CODE (801)
328-8888
299-1700

June 19, 2006

Elisabeth A. Shumaker
Clerk of the Court
U.S. COURT OF APPEALS
FOR THE TENTH CIRCUIT
1823 Stout Street
Denver, CO 80257

RE: Joseph et al. v. Salt Lake City Corporation, et al., case no. 05-4181

JOSEPH'S BRIEF OF APPELLANTS
Citation of Supplemental Authority – Walker v. United States, 744 F.2d 67 (10th Cir. 1984)

Dear Ms. Shumaker:

I write this letter pursuant to Fed. R. App. P. 38(j), having discovered pertinent and significant authority after the submission of Appellants' *Briefs*. On page 36 of Robert Joseph's opening brief, I desire to cite supplemental authority concerning Mr. Joseph's stigmatization argument, Walker v. United States, 744 F.2d 67 (10th Cir. 1984). In Walker, this Court addressed stigmatization of public employees including the dissemination of information. "When the termination is accompanied by public dissemination of the reasons for dismissal, and those reasons would stigmatize the employee's reputation or foreclose future employment opportunities, due process requires that the employee be provided a hearing at which he may test the validity of the

proffered grounds for dismissal." . . . . "Appellant should not be forced to reestablish his innocense every time he applies for benefits or a job." Id., at 69-70.

Please distribute this letter among the judges to be inserted in the Appellants' Brief for consideration and review.

Best regards, sincerely,

D. BRUCE OLIVER, L.L.C.

s/D. Bruce Oliver

D. Bruce Oliver

DBO/jkj
cc: Morris O. Haggerty

D. Bruce Oliver #5120
Attorney for Plaintiff
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1490
Telephone: (801) 328-8888
Fax: (801) 595-0300

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

ROBERT JOSEPH, Plaintiff, vs. SALT LAKE CITY CORP. , et al. Defendants.	AFFIDAVIT OF TRACE TAYLOR Case no. 2:00-cv-340 DAK Judge Dale A. Kimball Magistrate David O. Nuffer

STATE OF UTAH)
: ss.
COUNTY OF WEBER)

I, TRACE TAYLOR, being first duly sworn, depose and say:

1. I am a person over 18 years old and a resident of the State of Utah and this Affidavit is made on personal knowledge and belief.

2. I am a witness named by the Plaintiff Robert Joseph in the above-entitled action against Salt Lake City Corporation.

3. This affidavit is in support of Robert Joseph.

4. In speaking with Robert Joseph it is my understanding that he is a former Salt Lake City Police Officer who was

involved in a police shooting on or about March 26, 1999.

5. I've become interested in Mr. Joseph's case because just prior to his shooting I was present during a conversation that I overheard that sounded relevant to his incident.

6. During the winter months of 1998-1999, my father and I were having dinner one night in a Russian restaurant in Salt Lake City.

7. About twenty minutes after we were seated, a party of six or eight individuals sat next to us, one of the parties was then Mayor DeeDee Corradini, and one who appeared to be her husband due to how close they were sitting.

8. One of the individuals with her was a media personality, but I cannot place his name right now. The others that I could see appeared to be police types; however, none of them were in uniform.

9. That party got my attention because they were somewhat loud and obnoxious.

10. The media personality expressed his concern that the increased shooting could be related to increased gang numbers. He said Salt Lake was looking more like L.A.

11. Regarding the comment, the mayor expressed her concern, "All we need is for a Rodney King caught on tape before the Olympics."

12. I then overheard her to say that the next one "we're done! . . . . no more . . . we're not L.A. . . .the next one we're done."

13. They discussed the matter some more claiming that they had the eyes of the world on Salt Lake City and they did not want to convey the impression that we had something like a Gestapo police force or something like that.

14. Evidently, Mr. Joseph must have been the next shooting.

15. Further affiant sayeth naught.
Dated this 28th day of October, 2004.

/s/Trace Taylor
TRACE TAYLOR

SUBSCRIBED AND SWORN TO BEFORE ME this 28th day of October, 2004.

/s/Jason K Jensen
NOTARY PUBLIC
RESIDING AT:

My Commission Expires: 04/06/2010

D. Bruce Oliver #5120
Attorney for Plaintiff
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1490
Telephone: (801) 328-8888
Fax: (801) 595-0300

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

ROBERT JOSEPH, Plaintiff, vs. SALT LAKE CITY CORP. , et al. Defendants.	AFFIDAVIT OF: DARIN C. BELL Case no. 2:00-cv-340 DAK Judge Dale A. Kimball Magistrate David O. Nuffer

STATE OF TEXAS)
§
COUNTY OF PARKER)

I, DARIN C. BELL, being first duly sworn, depose and say:

1. I am a person over 18 years old and a resident of the State of Texas and this Affidavit is made on personal knowledge and belief.

2. I am a witness named by the Plaintiff Robert Joseph in the above-entitled action, his action against the Salt Lake City Corporation.

3. This affidavit is in support of Robert Joseph.

4. On or about March 26, 1999, I was an alleged witness and was interviewed concerning Mr. Joseph's shooting event.

5. At approximately 1:00 a.m., I was in my home located at

2331 South 700 East, Salt Lake County, Salt Lake City, State of Utah, it is located on the corner of 7th East and Ashton Avenue.

6. When Mr. Joseph's incident occurred, I was in the living room lying down watching TV when I heard gunshots outside on 700 East followed shortly by yelling and the sound of a car speeding away.

6. Hearing these sounds I ran to the window in the dining room, I looked outside the window to see a Salt Lake City Police officer getting up from the ground; the car had already left so I never got a good look at the car.

7. I could tell by the way he was moving that he must have been dragged by the vehicle that sped away. As he walked to his vehicle he had a slight limp.

8. Shortly afterwards I was interviewed by a Salt Lake City Police officer, Scott Teerlink, a copy of his brief narrative is attached herewith. The statements are incomplete. I informed the officer that Mr. Joseph was dragged and to this day I believe Mr. Joseph must have been shooting in self defense.

9. About an hour later I was interviewed by another officer, a detective named Steve Wooldridge. A copy of my statement that I gave him is attached. Prior to the tape-recording, I was interviewed by Detective Wooldridge.

10. In the first initial interview, I informed Detective Wooldridge that the officer, Mr. Joseph, was injured and must have been dragged by the vehicle. At that time, I believed that Officer Joseph must have shot in self-defense.

11. I am surprised to see in neither of the attached reports nothing is mentioned that I reported Officer Joseph was injured or that he must have shot in self-defense.

12. Further affiant sayeth naught.

Dated this 20th day of August, 2005.

/s/Darin C. Bell
DARIN C. BELL

SUBSCRIBED AND SWORN TO BEFORE ME this 20th

day of August, 2004.

/s/Carla Harris
NOTARY PUBLIC
RESIDING AT:

Notary Public, State of Texas
My Commission Expires
February 19, 2008

IN THE CIVIL SERVICE COMMISSION IN AND FOR SALT LAKE CITY, UTAH

ROBERT L. JOSEPH,

Petitioner,

-vs-

SALT LAKE CITY CORPORATION,

Respondent.

FORMAL HEARING

April 11, 2000

* * *

Reported by DENISE BENSON KIRK, CSR
Utah CSR No. 138

determination whether or not he felt criminal information should be issued.

Q. That's not your decision to make?

A. No, that is not.

Q. Did you follow standard practice in the way you proceeded to the District Attorney's Office?

A. Yes, I did.

Q. Were you aware of the statements of any other witnesses?

A. Yes.

Q. What did you recall of that?

A. There was a witness by the name of Bell, who lived on the east side of 7th East. He indicated that he heard some shots, looked out his window. Initially he thought it was some gang members because they were all dressed in dark clothes. He really couldn't make out a whole lot.

There was a branch in the way, so he moved off to the side and he was an officer out in the street in a standing up position, to quote him, firing down 7th East.

There was also another witness by the name of Childress, who also was interviewed and heard

DEPARTMENT OF COMMERCE
Heber M. Wells Building
160 East 300 South, Box 146741
Salt Lake City, Utah 84114-6741
Telephone: (801) 530-6990

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
DEPARTMENT OF COMMERCE, STATE OF UTAH

ROBERT L. JOSEPH Petitioner(s) -v- DAVID L. McCANN, M.D., FAPA Respondent(s),	Case No. PR - 03-04-039 NOTIFICATION OF PANEL OPINION

The above-entitled matter came on for hearing on the 19th day of August, 2003, before Jared Faerber, Richard B. Spencer, M.D., and Gloria Miley, prelitigation panel members all designated in that regard pursuant to section 78-14-12, Utah Code Ann. (1953), as amended, and the rules of procedure promulgated relative thereto.

As to the Respondent, the panel has determined that:

(1) _X_ The Respondent breached the applicable standard of care.

The Respondent's breach of the standard of care _X_ did or _____ did not result in harm to Petitioner.

(2) _____ The Respondent **did not** breach the applicable standard of care.

Based upon the above, the panel finds the claims as set forth in the request for prelitigation review is _X_ **MERITORIOUS** or _____ **NON-MERITORIOUS.**

Dated this 19th day of August, 2003

	MERITORIOUS	NON MERITORIOUS
s/ Jared Faeber Jared Faeber	X	
s/ Richard B. Spencer Richard B. Spencer, M. D.	X	
s/ Gloria Miley Gloria Miley	X	